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No.

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In the

# Supreme Court of the United States

October Term, 1998

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ANKER ENERGY CORPORATION and KING KNOB COAL CO., INC.,

*Petitioners,*

*v*

UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, et al.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

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## PETITION FOR A WRIT OF CERTIORARI

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12 pp

## QUESTION PRESENTED

Whether the severe retroactive liability imposed by the Coal Industry Retiree Health Benefit Act of 1992 on a company that last signed a "me too" agreement agreeing to be bound by the terms of the then current National Bituminous Coal Wage Agreement in 1984 (eight years before the Coal Act was enacted) violates the Takings Clause or the Due Process Clause of the Fifth Amendment.

## PARTIES TO THE PROCEEDINGS

Petitioners Anker Energy Corporation and King Knob Coal Company, Inc. were plaintiffs and appellants in the district and circuit courts, respectively. Respondents, United Mine Workers of America Combined Benefit Fund, Marty D. Hudson, Trustee, Michael H. Holland, Trustee, Thomas O.S. Rand, Trustee, Elliott A. Segal, Trustee, Carlton R. Sickles, Trustee, Gail R. Wilensky, Trustee, William P. Hobgood, Trustee and Shirley Sears Chater, Commissioner of the Social Security Administration, were defendants and appellees in those proceedings. Consolidation Coal Company (Consol) was also a defendant and appellee therein but petitioners are not seeking review of the judgment of the Third Circuit as to Consol which has advised petitioners that it will not be a participant in this proceeding.

Neither Anker nor King Knob (which are affiliates) is publicly owned and neither has a publicly owned parent or a non-wholly owned subsidiary.

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## PETITION FOR WRIT OF CERTIORARI

Anker Energy Corporation and King Knob Coal Company, Inc. respectfully petition for a writ of certiorari to review the judgment of the United State Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 177 F.3d 161 (3d Cir. 1999). The opinions of the district court on the judgment which is the subject of this petition (App. 41a and App. 51a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## PERTINENT PROVISIONS

The Fifth Amendment to the Constitution and pertinent provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701-9722, are reproduced at App. 74a.

[1] All citations to "App." herein are to the Appendix to this petition.

## STATEMENT OF THE CASE

A consideration of the facts relevant to the issues presented by this petition requires an examination of the historical facts which gave rise to the enactment of the Coal Industry Retiree Health Benefits Act of 1992 (the "Coal Act" or the "Act"), 26 U.S.C. §§ 9701-9722, as well as the statutory scheme which it creates, in addition to the particular facts of this case. The Coal Act requires former signatories of National Bituminous Coal Wage Agreements ("NBCWAs") to provide lifetime health benefits to former employees and their spouses and dependents. The historical facts leading to the enactment of the Act are set forth in the first part of the opinion of this Court (O'Connor, J.) in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2137-42 (1998). In *Eastern*, this Court held that the Coal Act was unconstitutional as applied to a former coal company that had last signed an NBCWA before 1974. This case presents the corollary issue whether the Coal Act is unconstitutional as applied to a company which last agreed to be bound by an NBCWA in 1984.

This case presents important questions concerning the proper application of *Eastern* by the district and circuit courts, including: (1) whether the Third Circuit's decision conflicts with *Eastern*, (2) the standards for applying plurality decisions of this Court, and (3) the appropriate legal framework for analyzing the constitutionality of retroactive economic legislation.

In *Eastern*, this Court held that the retroactive liability imposed by the Coal Act upon the petitioner in that case was unconstitutional. Petitioners submit that the undisputed facts of this case are even more compelling than those in *Eastern*.

For in *Eastern* the petitioner had conducted extensive mining operations over a period of more than 35 years; it had derived substantial financial benefits from those operations; it was a member of the Bituminous Coal Operators' Association ("BCOA") and had participated actively in the negotiation of the NBCWAs from their origin in 1947 until 1965 and was a signatory thereto; it had made contributions to the UMWA Benefit Funds pursuant to the NBCWAs it had negotiated throughout that period; it continued to derive substantial monetary benefits from the operation of the subsidiary (EACC) to which it had transferred its coal-related operations in 1965 for the next 22 years in the form of more than $100 million in dividends; and it did not sell its interest in its coal mining subsidiary until 1987.

Here King Knob was a mere contract miner for Consol; it had no ownership interest in the coal; it was not a member of the BCOA and it did not participate in the negotiation of any of the NBCWAs pursuant to which contributions were made to the UMWA Benefit Funds; and it was not obligated to - nor did it - make any contribution to those funds.

Despite this Court's ruling in *Eastern* and the compelling facts of this case, the Third Circuit held that the ruling in *Eastern* should not be applied to post-1974 NBCWA signatories. In so ruling, the panel analyzed this case under due process standards which a separate panel of the Third Circuit had articulated and applied in another Coal Act case some 47 days earlier. *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999) ("*Unity*").[2] Those standards appear to be based upon those articulated by the dissent in *Eastern*.

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[2] A petition for a writ of certiorari was filed in *Unity* in this Court on June 28, 1999 and is pending.

## Genesis of the Coal Act and its Statutory Scheme

As this Court pointed out in *Eastern*, "[f]or a good part of this century, employers in the coal industry have been involved in negotiations with the [UMWA] regarding the provision of employee benefits to coal miners." 118 S. Ct. at 2137. By 1946, "the subject of miners' health care had become a critical issue" in those negotiations. Following a nationwide strike and President Truman's seizure of the mines that year, the federal government negotiated an agreement with the UMWA which ultimately led to an agreement between several coal operators and the UMWA which came to be known as the National Bituminous Coal Wage Agreement of 1947. That agreement established a fund (the UMWA Welfare and Retirement Fund) in which the proceeds of a royalty on coal production were used to provide pension and medical benefits to miners and their families. Id. at 2137-38.

In 1950, a new multi-employer trust was created as part of the 1950 NBCWA. (The UMWA Welfare and Retirement Fund of 1950). Although this trust was amended on occasion between 1950 and 1974,[3] and new NBCWAs were adopted in 1968 and 1971, the terms and structure of the trust remained essentially unchanged. Miners and their dependents were not promised specific benefits and those benefits they did receive were subject to change by the trustees in order adequately to fund the trust. Benefits thus were provided on a "pay-as-you-go" basis. *Id.* at 2138-39.

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[3] A 1951 amendment recognized the creation of the Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association, which became the primary representative of coal operators in negotiations with the UMWA. *Id.* at 2138

In 1974, however, the Employee Retirement Income Security Act (ERISA) introduced specific funding and vesting requirements for pension plans. To comply with ERISA, the 1974 NBCWA created four trusts funded by royalties on coal production and premiums based upon hours worked by miners. Among other things, two of those trusts provided medical benefits, one for active miners and those who retired after 1975 (the 1974 Benefit Plan), and the other for miners who retired before January 1, 1976 (the 1950 Benefit Plan). As this Court observed in *Eastern, id.* at 2139:

> The 1974 NBCWA thus was the first agreement between the UMWA and the BCOA to expressly reference health benefits for retirees; prior agreements did not specifically mention retirees, and the scope of their benefits was left to the discretion of fund trustees.

The obligations were calculated by reference to current coal production (tons of coal mined or hours of UMWA labor). *Id.* Significantly, all of these obligations applied only during the life of the agreement and ended when the agreement terminated.

The 1978 NBCWA provided health benefits to three separate categories of UMWA retirees: (1) miners who retired before 1976; (2) miners who retired after 1975 whose employer remained in the coal mining business; and (3) miners who retired after 1975 whose employers left the coal mining business. *Unity Real Estate Co. v. Hudson,* 178 F.3d 649, 654 (3d Cir. 1999). Like the earlier NBCWAs, the obligations in the 1978 NBCWA ended with its expiration. The 1978 NBCWA also contained a so-called "guarantee" clause

and a so-called "evergreen" clause both of which also applied only during the period of the agreement. *Eastern*, 118 S.Ct. at 2140. Successor NBCWAs were executed in 1981 and 1984 which did not materially change the structure of the benefit plans. The 1981 and 1984 NBCWAs also both contained the limitation that they covered only the period of the agreement.

Under-funding of the benefit plans in the late 1980's and a long strike against the Pittston Coal Company led to the appointment of a Coal Commission in 1988 by the Secretary of Labor. 118 S.Ct. at 2140. The Commission was charged with recommending "a solution for ensuring that orphan retirees in the 1950 and 1974 Benefit Trusts will continue to receive promised medical care." *Id.* The Coal Commission recommended two alternative funding mechanisms. In the first, a fund would be financed by an industry-wide fee to provide health care to orphan retirees at the level of benefits they were entitled to receive at the inception of the fund. Retirees from signatories to the 1978 or later NBCWAs who remained in the coal business would receive benefits from another fund financed by their most recent employers. As an alternative to industry-wide liability, the Commission suggested that Congress spread the cost of retiree health benefits across a broadened base of current and past signatories to the NBCWAs. *Id.* at 2141.

Following the Commission's recommendations, Congress considered several proposals for funding health benefits for UMWA retirees. In 1992, as part of a larger bill, it passed legislation based upon the Coal Commission's first funding proposal. President Bush, however, vetoed the bill. Congress responded by passing the Coal Act, which represents a modified version of the Coal Commission's alternative

funding plan. This Court has summarized the statutory scheme of the Act, 118 S.Ct. at 2142, as follows:

> The Coal Act merged the 1950 and 1974 Benefit Plans into a new multi-employer plan called the United Mine Workers of America Combined Benefit Fund (Combined Fund). See 26 U.S.C. §§ 9702(a)(1), (2). The Combined Fund provides "substantially the same" health benefits to retirees and their dependents that they were receiving under the 1950 and 1974 Benefit Plans. See §§ 9703(b)(1), (f). It is financed by annual premiums assessed against "signatory coal operators", *i.e.*, coal operators that signed any NBCWA or any other agreement requiring contributions to the 1950 or 1974 Benefit Plans. See §§ 9701(b)(1), (3); § 9701(c)(1). Any signatory operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be liable for those premiums. § 9706(a); § 9701(c)(7). Where a signatory is no longer involved in any business activity, premiums may be levied against "related person[s]," including successors in interest and businesses or corporations under common control. § 9706(a); § 9701(c)(2)(A).

**Eastern Enterprises**

In *Eastern*, the petitioner had "conducted extensive coal mining operations centered in West Virginia and Pennsylvania" for more than 35 years, from 1929 until 1965. 118

S.Ct. at 2142-43. It had been a signatory to each NBCWA executed between 1947 and 1964 and, pursuant thereto, it had made contributions of over $60 million to fund welfare and retirement benefits for miners based upon its extensive mining operations.

In 1963, however, Eastern decided to transfer its coal-related operations to a subsidiary, Eastern Associated Coal Corporation (EACC), and that transfer was completed by the end of 1965. But Eastern retained its stock interest in EACC through another subsidiary until 1987. And it received over $100 million in dividends during that period from profits generated by EACC in its coal mining operations--which represented 100% of that subsidiary's dividends. It was not until 1987 that Eastern sold its interest in its subsidiary to a third-party. Under the terms of that sale, responsibility for payments to the UMWA Benefit Funds was assumed by the buyer, the Eastern subsidiary which was sold, and EACC. *Id.* at 2143, 2168.

Following enactment of the Coal Act, the Commissioner assigned responsibility to Eastern for Combined Fund premiums covering over 1,000 retired miners who had worked for the company before 1966. That assignment was confirmed in the district and circuit courts in the face of constitutional challenges thereto. On certiorari, however, this Court ruled that the assignment of such liability to Eastern violated the Fifth Amendment: four justices found a violation of the Takings Clause; Justice Kennedy grounded his concurrence on the Due Process Clause. In considering Eastern's "takings" challenge, the plurality identified the three factors which the Court traditionally has applied in a regulatory takings analysis: (1) the economic impact of the regulation on the claimant (2) the extent to which the

regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action. *Id.* at 2146. The Court pointed out that the Coal Act might be unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 2149.

With respect to the economic impact of the regulation on Eastern, the Court stated that "there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern," a liability which is substantial and continuing in nature. *Id.* at 2149. Further, the plurality stated, because Eastern had not participated in negotiations nor agreed to make contributions to the UMWA benefit plans after it had ceased its coal mining operations in 1965, that liability was out of all proportion to its experience with those plans. The Coal Act thus substantially interfered with Eastern's reasonable investment-backed expectations. *Id.* at 2149-52.

Finally, the plurality found the governmental action to be "quite unusual." It acknowledged that complex problems of the kind involved in the funding of health benefits for retired coal miners are of the sort which typically call for a legislative solution. But it pointed out:

> When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental

> action implicates fundamental principles of fairness underlying the Takings Clause.

Accordingly, the plurality concluded that application of the Coal Act to Eastern effected an unconstitutional taking. *Id.* at 2153. Based upon similar reasoning, Justice Kennedy found this retroactive imposition of liability a violation of the Due Process Clause. *Id.* at 2154-60.

**The Third Circuit's *Unity* Decision**

While the appeal of this case was pending before the Third Circuit, a separate panel of that court upheld the constitutionality of the Coal Act as applied to post-1974 NBCWA signatories in *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d. Cir. 1999). The specific question addressed by the panel in *Unity* was whether the decision of the Court in *Eastern* should be applied to the two post-1974 NBCWA signatories in *Unity*. The court acknowledged that "it is an exceedingly close question." 178 F.3d at 652. Nonetheless it concluded, "albeit with substantial hesitation," that the Coal Act does not violate due process."

In reasoning to this conclusion, the panel held that the federal courts are not bound by the points of agreement in the *Eastern* plurality and concurring opinions on the Fifth Amendment issue because those opinions rested on the Takings Clause and the Due Process Clause, respectively, and, "neither constitutional ground is a more limited version of the other." 178 F.3d at 659. The court of appeals ruled that *Eastern* mandated judgment for plaintiffs only if they stood "in a substantially identical position" to the petitioner in *Eastern* with respect to both the plurality and concurring opinions in that case. *Id.* Yet, paradoxically, the panel held that the

federal courts are bound by the agreement between the concurrence and the dissent in *Eastern* on the takings question. *(Id.)*.

Having found the plaintiffs in *Unity* distinguishable from the petitioner in *Eastern* because the former had signed post-1974 NBCWAS, the panel determined that "due process analysis encompasses the relevant concerns." *Id.* at 659. The court then made its own due process analysis which is substantially similar to the analysis of the dissent in *Eastern*. It applied the intermediate scrutiny/substantial evidence test of *Turner Broadcasting System, Inc. v. Federal Communications Commissions*, 117 S.Ct. 1174 (1997). In so doing, the panel deemed it significant that, unlike the petitioner in *Eastern*, the coal operators in *Unity* had been members of the BCOA which had negotiated post-1974 NBCWAs.

The panel next addressed the gap between the limited, contractually enforceable promise of health benefits in the post-1974 NBCWAs and the more far-reaching lifetime funding obligations imposed by the Coal Act. It acknowledged that "[t]he NBCWAs did not themselves guarantee that the coal companies would pay for lifetime benefits for retirees and their dependents." *Id.* at 664-65. The court further conceded that, under the plain language of the post-1974 NBCWAs, the companies were only obligated to contribute to the funds during the term of each NBCWA. *Id.* at 664. Notwithstanding this, it thought there were sufficient intimations in the post-1974 NBCWAs of lifetime benefits "that it would have been reasonable for miners to expect that the 'lifetime' health card actually meant that lifetime benefits would be provided to anyone in possession of a health card." *Id.* at 666. Further, the court said, "the Trustees could reasonably be seen as required to pay lifetime benefits to all

retirees and their dependents in possession of a health card; the contractual terms had the effect of binding the Trustees to a lifetime commitment, although they did not of themselves bind the coal companies to the same commitment." *Id.* at 667.

The panel next addressed the question whether Congress' analysis of the problem justified the funding measures which it mandated in the Coal Act, particularly in light of the substantial retroactive scope of the statute. On this score, the court pointed out that, although the retroactive period of eleven years for Unity was shorter than the period involved in *Eastern*, "it is still quite long." *Id.* at 670. As to the size of the burden imposed by such retroactive liability, the court pointed out that "the burden in this case is certainly substantial," thus requiring careful scrutiny of the Coal Act. *Id.* at 671.

With respect to the issue of proportionality and Congress' ability to go beyond private contracts, the panel thought that the coal operators in *Unity* had contributed to the instability of the benefit funding structure which led to the Act, and that the expectation of lifetime benefits engendered by the post-1974 NBCWAs which the operators had negotiated, as well as their consistent practices, justified the imposition of liability under the Act. *Id.* at 672.

The panel concluded that the post-1974 NBCWAs created a reasonable expectation of lifetime health benefits and, thus, held that the Coal Act was constitutional as applied to *Unity* despite its "quite long" periods of retroactivity and its "substantial" economic burdens. *Id.* at 674.

**This Litigation**

Insofar as relevant to this petition, this is an action for a declaratory judgment and injunctive relief which seeks a ruling that the Coal Act as applied to petitioners,[4] violates the Takings and Due Process Clauses of the Fifth Amendment. Federal question jurisdiction is based on the Constitution and the Coal Act.

**Contract Mining Agreements Between King Knob and Consol**

King Knob had a long-standing contract mining relationship with Consol dating back to 1967 which involved at least eight such agreements. Pursuant thereto, King Knob performed mining services for Consol which owned the mines. Consol retained the economic interest in the coal and coal reserves which were the subject of the contracts and King Knob had no interest therein. Consol was required to make all benefit payments which were required to be made to the UMWA Benefit Funds.

Consol was a member of the BCOA which negotiated the NBCWAs with the UMWA -- King Knob was not, and it had no involvement in those negotiations. Under the parties' contract mining agreements, however, King Knob was required to employ UMWA-represented miners at the mines which were the subject of those agreements. Accordingly, up to and including 1984, King Knob agreed to be bound by the NBCWAs in what is known in the industry as "me too" agreements. As previously stated, however, under the

[4] Petitioner Anker Energy Corporation ("Anker") is an affiliate of petitioner King Knob Coal Co., Inc. ("King Knob") which is no longer in business.

contract mining agreements, Consol had the responsibility to -- and it did -- make all royalty payments required to be made to the UMWA Benefit Funds concerning the subject mines and the miners employed there. King Knob had nothing to do with those payments, all of which were calculated, paid, and administered by Consol alone.

In 1982, Consol abruptly terminated the contract mining agreements. Subsequently, petitioners and Consol entered into a settlement of petitioners' claims for Consol's termination of these contracts. As part of the settlement, Consol agreed to remain responsible for all subsequent payments that might be due to the UMWA fund or any successor funds. In 1994 and 1995, however, Anker was notified by the Commissioner that it had been assigned financial responsibility for payment of Combined Fund premiums with respect to a number of King Knob retirees on the grounds that it was a "related person" to King Knob which was no longer in business. As a result of these assignments, Anker had been assessed monthly premiums by the Combined Fund which totaled in excess of $140,000 as of the filing of this action in late 1995. On motion for summary judgment in the district court, that court held the Coal Act constitutional as applied to petitioners and entered judgment against them on this issue. Thereafter, the district court established a procedure for liquidating the Combined Fund's claim for health benefit premiums. Following evidentiary submissions by the Combined Fund as ordered by the court, and after briefing by the parties, the district court entered a final judgment on the Combined Fund's counterclaim in the amount of $1,180,489.06.

On appeal, the Third Circuit affirmed on the constitutional issue based upon the earlier decision of the panel in *Unity* which is discussed above. Relying upon that decision,

the panel analyzed the fragmented decision in *Eastern* and held that "the only binding aspect of a splintered decision is its specific result . . . ." (App. 17a) Thus, quoting *Unity*, the panel held that "*Eastern* requires a finding that the Coal Act is unconstitutional as applied to Anker, then, only if Anker 'stand[s] in a substantially identical position to *Eastern* with respect to both the plurality and Justice Kennedy's concurrence.'" (App. 17a). Again quoting *Unity*, the panel held that it was bound to follow the five-four vote against the takings claim. (App. at 37a-38a). Thus, the court rejected Anker's takings claim on the basis of the combined decisions of the concurrence and dissent in *Eastern*.

The panel reasoned that its analysis of *Eastern* "leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while the application of the Act to a signatory to the 1974 or subsequent wage agreement would be an entirely different matter." (App. 21a). As a result of King Knob's signing of "me too" agreements after 1974, the panel held that petitioners were distinguishable from the petitioner in *Eastern* and, thus, not controlled by its result. The court concluded that this case "falls squarely under our analysis and holding in *Unity Real Estate*." (App. 25a)

Having concluded that this case was controlled by *Unity* and not by *Eastern*, the panel then applied the due process analysis set forth in *Unity* and held that application of the Coal Act to Anker was constitutional. Based upon the ruling in *Unity* that the retroactive application of the Coal Act to a party who had last signed an NBCWA eleven years before the statute was enacted was permissible, "although a close case," the court reasoned that application of the Act to

King Knob, which had last signed a "me too" agreement eight years before that enactment, was likewise acceptable. (App. 24a). Similarly, the court held that the "proportionality analysis in [*Unity*] applies full force here because King Knob was a signatory to the 1978 and subsequent NBCWAs, and thus bears the same responsibility as the plaintiffs in [*Unity*] for creating the reasonable expectations and the problems of underfunding that the Coal Act redresses." (App. 24a)

The panel acknowledged that petitioners here, unlike the plaintiffs in *Unity*, had never been members of the BCOA which had negotiated the NBCWAs which it found had created the miners' expectation of lifetime benefits. (App. 24a). Despite the fact that the *Unity* court had found the participation of the parties in negotiating the NBCWAs to be a significant factor in permitting retroactive liability to be constitutionally imposed on them, the panel in this case did not consider this significant. (App. 24a).

The panel concluded "overall, inasmuch as nothing germane to our holding in [*Unity*] distinguishes Anker from the plaintiffs in [*Unity*], application of that case's due process analysis leads us once again to conclude that the Act does not violate constitutional norms, this time as applied to Anker." (App. at 25a).

## REASONS FOR GRANTING THE WRIT

### I. THE THIRD CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *EASTERN.*

#### A. The Third Circuit failed to follow Eastern

In *Eastern,* five justices held that application of the Coal Act to Eastern was unconstitutional. Those justices agreed that retroactive employee benefits legislation is unconstitutional if it imposes a substantial economic burden on employers which is based on conduct "far in the past" that is "unrelated to any commitment that the employers made or to any injury they caused." 118 S.Ct. at 2153 (plurality); *Id.* at 2158-60 (concurrence). The Third Circuit failed to follow this ruling and apply it in this case.

Proper application of *Eastern* requires that the substantial retroactive liability imposed on companies like Anker under the Coal Act is unconstitutional. The Third Circuit erroneously concluded that, although five justices had reached the same result invalidating the Coal Act based upon virtually identical reasoning, *Eastern* has no precedential value beyond its specific facts. The court of appeals further ruled, based upon combining the concurrence and the dissent, that *Eastern* holds that the Coal Act does not violate the Takings Clause. The court ignored the plurality's reasoning in *Eastern* since it was based upon the Takings Clause. Instead, the court fashioned its own due process analysis based upon the dissent in *Eastern.* The import of this decision is that the Third Circuit has interpreted the dissent in *Eastern* as the law of the case. Thus, this case raises important issues with respect to the

proper application of this Court's decision in *Eastern*. In that case, five justices were in agreement that the Coal Act was unconstitutional as applied to the petitioner therein, reaching that result by a virtually identical retroactivity analysis. Proper application of this rationale compels a determination that the Coal Act is likewise unconstitutional as to signatories of post-1974 NBCWAs like petitioners.

First, as the court of appeals recognized, "the burden the Coal Act imposes upon parties assessed liability is substantial." (App. 23a) As in *Eastern*, "there is no doubt that the Coal Act has forced a considerable financial burden upon" petitioners. In notices dated March 30, 1994 and June 30, 1995, the Commissioner has assigned approximately 189 retirees, their spouses and other dependents to petitioners. Based upon these assignments, the Combined Fund assessed monthly premiums against them totaling $141,000 as of the filing of this suit in late 1995. As of the date the district court entered judgment on the Combined Fund's counterclaim for those premiums on July 21, 1998 -- less than two years later -- these assessments totaled over $828,000. Further, the assessment of interest, liquidated damages, attorneys' fees and costs increased the amount of that judgment to $1,180,489.06. Moreover, by their nature, the Combined Fund's monthly assessments of premiums are continuing in nature.

Second, the degree of retroactivity here, while not as long as that in *Eastern*, is still quite long. In this case, the court's decision imposes Coal Act liability eight years after King Knob last signed a "me too" agreement agreeing to be bound by an NBCWA. This reach-back of more than eight years is well in excess of the retroactive periods upheld as constitutional by this Court. The court of appeals relied upon

the determination of the panel in *Unity* which upheld the Coal Act as applied to another operator bound by the 1984 NBCWA, although that panel had acknowledged that the retroactive period was "still quite long" and presented a "close case." Clearly, such retroactive application cannot be defended as "confined to short and limited periods required by the practicalities of producing national legislation." See, *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam). Because King Knob was never responsible for the payment of premiums or royalties to any of the UMWA Benefit Fund predecessors to the Combined Fund, it had no experience whatsoever with the plans. Thus, even more so than in *Eastern*, the liability which the Act has imposed upon petitioners here is out of all proportion to their experience with the plans -- which was non-existent.

Third, petitioners never made any past promise or commitment for lifetime benefits. Hence the substantial burden imposed on petitioners is completely unrelated to any past conduct and is not related to any commitment they have ever made. Moreover, each of the NBCWAs to which King Knob signed "me too" agreements makes clear that the health benefits to be provided to the retirees and the obligations to pay therefor are limited to the term of that specific NBCWA. Every NBCWA to which King Knob had signed a "me too" agreement had long since expired before enactment of the Coal Act.

Fourth, this Court ruled in *Eastern* that the Coal Act health benefits package is not a remedy for injuries caused by employment in the mines. 118 S.Ct. at 2152-53, 2159. The Court's conclusion on this issue applies equally to signatories of post-1974 NBCWAs as to signatories of pre-1974 NBCWAs.

Thus, the retroactive Coal Act liabilities imposed upon petitioners are "substantial in amount," based upon conduct "far in the past," which was "unrelated to any commitment the employers made or to any injury they caused." Proper application of the common reasoning of the five justices who concurred in the result in *Eastern* compels a ruling that the Coal Act is unconstitutional as applied to petitioners.

### B. A Ruling By This Court In *Unity* Must Be Applied To Petitioners

In this case, the Third Circuit declined to apply this Court's plurality and concurrence in *Eastern.* Instead, it held that this case is controlled by *Unity.* If the Court grants the pending petition for a writ of certiorari in Unity, any ruling it issues on the merits of that case, which raises the identical constitutional issues as are raised by this petition in a similar factual setting, must be applied to petitioners. Indeed, petitioners present an even more compelling case. The key factual difference between petitioners here and those in *Unity* is that these petitioners were never members of the BCOA, never negotiated any of the NBCWAs and were never obligated--nor did they--make any payments on behalf of the assigned miners.

For these reasons, petitioners submit that, if the petition for certiorari in *Unity* is granted, this petition should also be granted and consolidated for briefing and argument with the *Unity* case. Alternatively, the Court should hold this case in abeyance pending its decision in *Unity*.

### C. The Applicability of *Eastern* To Post-1974 NBCWA Signatories Is An Important And Recurring Question

Finally, the constitutionality of the Coal Act as applied to signatories of post-1974 NBCWAs is an important and recurring question, as evidenced by the pending petition for certiorari in *Unity*. Moreover, in light of the Third Circuit's determination that *Eastern* does not control this issue, the question presented by this petition has substantial significance since most of the companies subject to the Coal Act are similarly situated to petitioners and not to the parties in *Eastern*. Specifically, most of the coal operators who are subject to the Coal Act agreed to be bound by at least one post-1974 NBCWA. As a result, the questions presented by this petition, like those in *Unity*, are actually of more significance than those decided by *Eastern* as interpreted by the Third Circuit. In light of the importance of this question and the failure of the lower federal courts to follow the teachings of *Eastern*, this Court should grant this petition.

## II. THE DECISION OF THE THIRD CIRCUIT RAISES FAR-REACHING QUESTIONS BEYOND THE COAL ACT

### A. The Court Should Provide Guidance Regarding The Proper Interpretation And Application Of Its Plurality Opinions

In light of the ever-increasing number of plurality opinions of the Court, the proper interpretation to be given to its plurality decisions by the lower federal courts also raises

an important and recurring issue beyond the Coal Act. This Court has previously held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" (citation omitted). *Marks v. United States*, 430 U.S. 188, 193 (1977). (See also, App. 16a). This case raises important issues for all cases in which one of the grounds relied upon by this Court cannot be viewed as "narrower" than another.

Here the Third Circuit held that, "[i]n cases where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." (App. 16a-17a). As a result, the Third Circuit failed to give import to the points of agreement between the *Eastern* plurality and the concurrence. On the other hand, it did give legal effect to the agreement between the concurrence and dissent.

In *Eastern*, five justices agreed about the controlling legal principles, disagreeing only about which Clause of the Fifth Amendment controlled. Specifically, five justices agreed that the Coal Act could not constitutionally be applied to Eastern under the Fifth Amendment, although they disagreed as to whether the ground of this ruling should be the Due Process Clause or the Takings Clause. The Third Circuit held that this disagreement resulted in a holding which is only binding in cases which are virtually identical to *Eastern*. In all other respects, the Third Circuit disregarded the plurality opinion and held that it was of no binding precedential value notwithstanding the common reasoning of five justices.

For these reasons, this Court should provide guidance to the federal courts as to the proper interpretation of its plurality decisions where neither decision is based on a narrower ground. Here, the Third Circuit has held that, absent a *Marks* majority, the Court's decision is only binding in identical cases.

### B. The Court Should Clarify the Framework for Reviewing Retroactive Economic Legislation

Guidance is also needed from the Court with respect to the proper legal framework for assessing the constitutionality of retroactive economic legislation. The importance of this issue is highlighted by the fact that the Third Circuit created a majority out of the concurrence and dissent and, thus, established as the law of the case the position taken by the *Eastern* dissent that the Coal Act does not violate the Takings Clause. Significantly, the import of this interpretation is that, even though this Court struck down this retroactive economic legislation, there is no framework for analyzing other retroactive economic legislation.

Prior to *Eastern*, the Court had refused to strike down a retroactive economic statute on due process grounds for more than 60 years. *See Eastern Enterprises v. Chater,* 110 F.3d 150, 158-59 (1st Cir. 1997) *rev'd*, 118 S.Ct. 2131 (1999). During that period, the Court repeatedly held that retroactive economic legislation contained a "presumption of constitutionality" which effectively disposed of all such challenges. Relying upon that presumption, the federal courts which reviewed the Coal Act prior to *Eastern* had held that it was constitutional.

The decision of the Court in *Eastern* which held the Coal Act unconstitutional as an improper retroactive economic statute, in part by acknowledging the presumption that retroactivity is "generally disfavored," is therefore a significant and important change. In fact, *Eastern* draws into question the presumption of constitutionality for economic legislation which dominated the Court's jurisprudence for more than 60 years. Notwithstanding this, the courts which have applied *Eastern* still adhere to the presumption of constitutionality by uniformly limiting and distinguishing that decision.

Accordingly, a review of this case is necessary both to clarify *Eastern* and to provide guidance to the federal courts concerning the proper legal precepts to apply in adjudging retroactive economic legislation.

## CONCLUSION

For these reasons, this petition should be granted.

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Date: August 12, 1999
Counsel for Petitioners

(Any footnotes trail end of each document)

No. 98-3451

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANKER ENERGY CORPORATION, AND KING KNOB COAL COMPANY, INC.,
Appellants

v.

CONSOLIDATION COAL COMPANY; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND; MARTY D. HUDSON, TRUSTEE; MICHAEL H. HOLLAND, TRUSTEE; THOMAS O.S. RAND, TRUSTEE; ELLIOTT A. SEGAL, TRUSTEE; CARLTON R. SICKLES, TRUSTEE; GAIL R. WILENSKY, TRUSTEE; WILLIAM P. HOBGOOD, TRUSTEE; KENNETH S. APFEL, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION *

* Kenneth F. Apfel is substituted as a defendant for Shirley Sears Chater as Commissioner, pursuant to Fed. R. Civ. P. 25(d)(i) and Fed. R. App. P. 43(c).

March 25, 1999, Argued
May 14, 1999, Filed

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Frank W. Hunger, Assistant Attorney General, Harry Litman, United States Attorney, Douglas N. Letter, Edward R. Cohen (argued), Attorneys, Appellate Staff, Washington, DC. Frieda S. Colfelt, Department of Health and Human Services, Office of General Counsel, Baltimore, MD, Attorneys for Appellee Commissioner of Social Security.

JUDGES: BEFORE: GREENBERG, ROTH, and ROSENN, Circuit Judges.

OPINIONBY: GREENBERG

OPINION: OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

In 1992, Congress enacted the Coal Industry Retiree Health Benefits Act ("Coal Act"), 26 U.S.C. § 9701-9722, to ensure that retired coal miners and their dependents would continue to receive the health and death benefits they had been receiving since the 1940s pursuant to a series of collective bargaining agreements. By the late 1980s, problems had arisen that caused serious under-funding to the two benefit plans funding the miners' benefits. Fearing that the miners and their families would be left with no health or death benefits, Congress stepped in and passed the Coal Act, which provided a new funding mechanism under which the Commissioner of Social Security ("Commissioner") would assign miners to a coal industry employer based on the recency and longevity of a miner's employment. That employer then would be responsible for providing the funds for those miners' benefits.

The Coal Act has led to a flood of litigation challenging the Commissioner's assignments of liability under the Act, as well as Takings and Due Process challenges to the constitutional validity of the Act's imposition of retroactive liability. Following this legal trend, Anker Energy Corp. ("Anker") filed this action in the United States District Court for the Western District of Pennsylvania seeking declaratory and injunctive relief that the Commissioner improperly assigned it responsibility for funding certain miners' benefits and that these assignments violated the Takings and Due Process Clauses of the Fifth Amendment to the United States Constitution. Anker also asserted that appellee Consolidation Coal Co. ("Consol") had agreed to assume liability for any payments due for miners' benefits and to reimburse Anker for any such payments Anker made, and thus was liable to it for the monies attributable to the assignments.

The district court dismissed all of these claims at the pleadings and summary judgment stages of litigation. First, the court granted Consol's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on Anker's claims that the Commissioner should have assigned the miners to Consol, and that Consol had agreed to indemnify Anker for any liability it incurred for the payment of miners' benefits. See Anker Energy Corp. v. Consolidation Coal Co., Civ. No. 96-1938 (W.D. Pa. July 25, 1997) (Anker I). Subsequently, the district court upheld the constitutionality of the application of the Coal Act to Anker on a motion for summary judgment. See Anker Energy Corp. v. Consolidation Coal Co., Civ. No. 96-1938 (W.D. Pa. Mar. 11, 1998) (Anker II). Finally, inasmuch as it had affirmed the imposition of liability against Anker and had determined that Anker was delinquent in its payments under the Act, the district court entered a judgment of $ 1,180,489.06 against Anker for annual premiums, interest, liquidated damages, attorney's fees, and costs. See Anker Energy Corp. v. Consolidation Coal Co., Civ. No. 96-1938 (W.D. Pa. July 21, 1998) (Anker III). This appeal followed.

## II. FACTUAL AND PROCEDURAL HISTORY

### A. Factual History

The courts have well-chronicled the history of the coal industry's struggles to provide retirement and health benefits to miners. See, e.g., Unity Real Estate Co. v. Hudson, F.3d , 1999 U.S. App. LEXIS 5620, 1999 WL 167765, at *2-4 (3d Cir. Mar. 29, 1999); Eastern Enters. v. Apfel, 524 U.S. 498, , 118 S. Ct. 2131, 2137-42, 141 L. Ed. 2d 451 (1998) (plurality opinion). Therefore, we only briefly will

summarize this chronology and outline the parties' roles within that larger story.

In 1947, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA") agreed upon the first of a series of National Bituminous Wage Agreements ("NBCWA" or "wage agreement"), which specified the terms and conditions of employment and provided health and pension benefits for miners. The 1947 NBCWA established the United Mine Workers of America Welfare and Retirement Fund, which used the proceeds of a royalty on coal production to provide pension and medical benefits for miners and their families. The 1947 NBCWA did not specify the benefits to which miners and their families were entitled, instead leaving this task to three trustees in charge of the Fund. In 1950 the union and the industry association agreed upon a new NBCWA that created a new Fund financed by a per ton levy on coal mined by signatory operators. Like the 1947 Fund, the 1950 version did not promise specific benefits, and the benefits were always subject to cancellation or change.

This system did not change significantly until 1974 when, to comply with the newly enacted ERISA, the UMWA and the BCOA negotiated a new wage agreement that created four trusts funded by royalties on coal production and premiums based on hours worked by miners. Under the new agreement, the 1950 Benefit Plan covered miners who retired before January 1, 1976, and their dependents, while the 1974 Benefit Plan covered miners who retired after 1975 and their dependents. Both Plans provided non-pension benefits, including medical benefits.

The 1974 NBCWA explained that it was amending the previous system to provide health benefits for retired miners "for life," and to their widows until death or remarriage. Because of this broadened coverage the number of eligible benefit recipients increased dramatically, and the Plans began losing money.

In response, the 1978 NBCWA assigned responsibility to signatory employers for the health care of their own active and retired employees. The 1978 agreement also restricted the 1974 Plan so that it would provide health benefits only for "orphaned" retirees, those whose last employer had gone out of business or otherwise ceased contributing to the Plans. To ensure the Plans' solvency, the 1978 NBCWA included a "guarantee" clause that obligated signatories to make sufficient contributions to maintain benefits during that agreement, and the union and operators amended the Plans to include "evergreen clauses" that required signatories to contribute to the Plans if they remained in the coal business even if they never signed another wage agreement.

Despite the 1978 NBCWA and subsequent attempts to improve the Plans, they continued to lose money because of the increase in beneficiaries, the escalating costs of health care, and the flood of signatory companies abandoning the Plans. In 1992 Congress responded by passing the Coal Act. The Act merged the 1950 and 1974 Benefit Plans into a new multi-employer plan called the United Mine Workers of America Combined Benefit Fund ("Combined Fund"). The Combined Fund provides "substantially the same" health benefits to retirees and their dependents that the 1950 and 1974 Plans provided. 26 U.S.C. § 9703(b)(1), (f). However, Congress altered the funding mechanism, an action that has led to the overflow of litigation.

The Act finances the Combined Fund with annual premiums assessed against signatory operators, which are companies that were or are signatories to a "coal wage agreement." 26 U.S.C. § 9701(c)(1). The Act defines a "coal wage agreement" as an NBCWA, or "any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required" the provision of health benefits to its retirees or contributions to the 1950, 1974 or any prior Benefit Plan. 26 U.S.C. § 9701(b)(1)(A), (B). Any signatory operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be required to contribute to the Combined Fund. 26 U.S.C. §§ 9701(c)(7), 9706(a). Where a signatory operator is no longer involved in any business activity, premiums may be assessed against "related persons" including "successors in interest and businesses or corporations under common control." Eastern Enters., 524 U.S. at , 118 S. Ct. at 2142 (discussing 26 U.S.C. §§ 9701(c)(2)(A), 9706(a)).

The Commissioner of Social Security assigns retirees to particular signatory operators, and calculates premiums according to these assignments based on the following formula:

> (a) In general. -- For purposes of this chapter, the Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which --

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which --

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a).

The surge of litigation attacking the Coal Act began shortly after the Commissioner began assigning retirees to signatory operators. In Lindsey Coal Mining Co. v. Chater, 90 F.3d 688 (3d Cir. 1996), we held the Act constitutional as applied to a

coal company to which the Commissioner had assigned retirees through section 9706(a)(3) concerning those signatory operators who had not signed the 1978 agreement. See id. at 695. However, the Supreme Court's decision in Eastern Enterprises, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451, calls the continuing vitality of Lindsey Coal Mining into question, as the Court found the Act unconstitutional as applied to a coal company that had ceased mining in 1965 and never signed the 1974 or subsequent wage agreements. 118 S. Ct. at 2153 (plurality opinion); id. at 2154 (Kennedy, J., concurring in judgment).

We recently have had the opportunity to apply the fragmented Eastern Enterprises decision to facts similar to those here. In Unity Real Estate, 1999 U.S. App. LEXIS 5620, 1999 WL 167765, we upheld the Commissioner's assessment of liability against two companies that had signed the 1974 and 1978 wage agreements and later NBCWAs as constitutional in the face of takings and due process challenges. Id. at *25, *29.

B. Procedural History

The seeds of discontent that led to this suit were sown on March 30, 1994, when the Commissioner informed Anker that she was assigning it liability for certain retired miners, surviving spouses and dependents, and several orphaned miners due to its relationship with King Knob Coal Co. ("King Knob") which no longer was in business. From 1967 until 1982, Consol had contracted with King Knob for it to extract coal on certain of Consol's properties. As part of these contracts, King Knob agreed that "its employees shall be members of the United Mine Workers of America and it shall

be a signatory to the then current National Bituminous Coal Wage Agreement." App. at 75.

To achieve this end, King Knob signed "me too" agreements during the 1970s and 1980s, the last in 1984. See app. at 8. Anker characterizes a "me too" agreement as an agreement between an employer who was not a member of the BCOA nor an NBCWA signatory yet who agreed by separate instrument with the UMWA to "be bound by the terms of the NBCWAs." App. at 8.

An affiliate of Anker acquired King Knob in 1975. The parties' relationship continued uneventfully until Consol canceled its contracts with King Knob following which they entered into a settlement agreement on July 23, 1982. Paragraph 4(b) of the settlement required Consol to

> promptly reimburse King Knob for all subsequent payments due to the UMWA Fund or any successor fund attributable to (i) tonnage of coal produced under the contracts, (ii) hours worked at the mine operated under the Robinson Run contract on or before August 31, 1982, and (iii) hours worked at the mines operated under the Booth contract on or before June 30, 1982.

App. at 17, 97.

In 1994 and 1995, the Commissioner informed Anker that it was a related person to King Knob and was being assigned liability for a number of beneficiaries under the Coal Act. Arguing that Consol was the proper signatory operator

responsible for some of these retirees under the Act as they worked at Consol's properties and Consol was responsible for them, Anker protested this assignment. The Commissioner responded that Anker's liability was based upon the fact that King Knob (not Consol) was the signatory employer of the eligible retirees. Moreover, the Commissioner determined that she was not authorized to assign Anker's premiums to Consol despite the parties' possible contractual agreement for reimbursement of future benefits because the Social Security Administration "is not bound by any private agreements made between companies, nor does the Coal Act allow for pro-ration of premium payments between companies." App. at 33.

Anker and King Knob responded by filing this action seeking declaratory and injunctive relief that Consol is liable for any premiums due the Combined Fund, and that the Commissioner's assessment of liability to the Combined Fund under the Coal Act violates the Due Process and Takings Clauses of the Fifth Amendment to the United States Constitution. As a matter of convenience we usually refer to Anker alone as the plaintiff and appellant. Besides Consol, Anker named the UMWA Combined Fund, its Trustees and the Commissioner as defendants.

In an unpublished disposition, the district court granted Consol's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) as to Counts One and Two of Anker's complaint. Anker I at 2. In Count One, Anker alleged that Consol had agreed with King Knob and the UMWA that it would pay the premiums owed to the 1950 and 1974 Plans based upon the amount of coal produced and the hours worked by King Knob's employees. Id. at 13. Anker contended that because of these agreements, Consol became

the signatory operator responsible for King Knob's employees' benefits under the 1950 and 1974 Plans, and thus was the proper party to which the Commissioner should assign King Knob's retirees. Id. at 14.

The district court held that Anker could not support this claim and granted Consol judgment as a matter of law on Count One. Id. The court recognized that "it is undisputed that King Knob was a signatory to one or more coal wage agreements covering its employees at Consol's Booth and Robinson Run properties, and that Anker is a 'related person' to King Knob as defined in the Coal Act." Id. at 15. King Knob was also clearly the employer of the miners. Id. at 20. Thus, the Commissioner's assignment of beneficiaries and liability under the Act to Anker as a related person to King Knob was correct. Id. at 21. Moreover, the court refuted Anker's argument that Consol had agreed in 1982 to be responsible for any future contributions owed to a subsequent benefit plan, and agreed with the Commissioner that the Coal Act does not allow for the assessment [*168] of liability based upon private contracts. Id. at 15-16.

The court also granted Consol's motion for judgment on the pleadings on Count Two, which alleged that pursuant to their settlement agreement Consol was liable to Anker for all premiums for which Anker is responsible under the Act. Id. at 21. The court rejected Anker's argument that paragraph 4(b) of the settlement agreement bound Consol to reimburse King Knob, and thus Anker, for its liability under the Coal Act, reasoning that premiums under the Act are not

> 'attributable to' the tonnage of coal produced and the number of hours worked under the contract mining agreements, and the

> Combined Fund is not a successor fund which requires premium payments based on the tonnage of coal produced or the number of hours worked by a signatory operator's employees. Rather, under the Coal Act, health benefits are funded by the imposition of what is, in essence, a tax.

Id. at 22-23. Finally, the court relied upon Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996), when it held that even if Anker was entitled to reimbursement under its contract with Consol, Consol still would be entitled to judgment as a matter of law because "the Coal Act abrogated pre-act contracts reallocating mining companies' obligations to pre-Act benefit plans." Id. at 24 n.17. Next the district court upheld the constitutionality of the application of the Coal Act to Anker in a second unpublished decision, and, relying upon our holding in Lindsey Coal Mining, 90 F.3d 688, granted summary judgment in favor of the Combined Fund, its Trustees, and the Commissioner on Count Three which sought a finding of unconstitutionality. Anker II at 6.

Finally, on July 21, 1998, the district court granted summary judgment on the Combined Fund's counterclaim for entry of a judgment against Anker and King Knob for annual premiums, interest, liquidated damages, attorney's fees, and costs. Anker III at 10-11. Anker did not contest the assessment of annual premiums. Id. at 6 n.3. Considering this fact and Congress's clear intent to provide for liquidated damages, interest, attorney's fees, and costs if an employer fails to make timely payments, the court entered judgment for $ !,180,489.06 against Anker and King Knob in a third unpublished disposition. Id. at 11. Anker and King Knob then appealed.

## III. DISCUSSION

Anker argues that the Coal Act is unconstitutional as applied to it according to the Supreme Court's decision in Eastern Enterprises, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451. Appellants' Brief at 19-26. Alternatively, Anker urges us to reverse the district court's grant of judgment on the pleadings against it on Counts One and Two of its complaint. Id. at 26-37. Anker repeats its position concerning Count One that the Commissioner should have assigned the miners at issue to Consol. As to Count Two, Anker contends that the district court erroneously found paragraph 4(b) of the settlement agreement between King Knob and Consol clear and unambiguous. Consequently, Anker believes that the district court erred in not considering its parol evidence, and that under our precedent, parol evidence is essential to interpreting the parties' intent correctly. Moreover, Anker argues that the district court's interpretation of paragraph 4(b) of the settlement agreement was simply wrong. Id. at 28-37. Finally, Anker contests the district court's awarding the Combined Fund interest, liquidated damages, attorney's fees, and costs, arguing that the Act does not provide for the assessment of these items. Id. at 37-48.

We will affirm the district court's decisions regarding the constitutionality of the Act, the correctness of the Commissioner's assignments, and the award of interest, liquidated damages, fees and costs against Anker. However, we will reverse the court's order granting judgment on the pleadings on Count Two, Anker's contract claim for reimbursement from Consol, and will remand to the district court for further proceedings on that count. [1]

A. Standard of Review

In reviewing the district court's order, we examine the Commissioner's action under the same standard of review properly applied by the district court. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985). Thus, we review the Commissioner's decision as a final agency action brought under the Administrative Procedure Act. See Lindsey Coal Mining, 90 F.3d at 691; 5 U.S.C. § 704. Accordingly, the issue is whether the administrative determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[2] See C.K. v. New Jersey Dep't of Health and Human Servs., 92 F.3d 171, 182 (3d Cir. 1996).

We review the district court's decision as to the constitutionality of the Coal Act as applied to Anker de novo. See Dyszel v. Marks, 6 F.3d 116, 123 (3d Cir. 1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment where the district court was not reviewing the Commissioner's decisions is plenary. See Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 183 (3d Cir. 1998), rev'd on other grounds, 119 S. Ct. 924 (1999); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993).

B. Takings and Due Process Challenges

Our discussion of Anker's constitutional challenge begins with Eastern Enterprises, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451, where a fragmented Supreme Court considered the constitutionality of the Coal Act as applied to a company whose coal operations had ceased in 1965. Id. at , 118 S.

Ct. at 2143. A majority of the Court struck down the law as applied to Eastern Enterprises by relying on two distinct theories. The four-justice plurality held that application of the Coal Act to Eastern Enterprises violated the Fifth Amendment as an unconstitutional taking. Id. at , 118 S. Ct. at 2149. Justice Kennedy, who provided the fifth vote striking down the application of the Act, disagreed with the plurality's takings reasoning, but found that the Act's retroactivity violated due process. Id. at , 118 S. Ct. at 2154 (Kennedy, J., concurring in judgment and dissenting in part). The four dissenting justices agreed with Justice Kennedy that application of the statute did not violate the Takings Clause, yet disagreed with his opinion that the Act violated due process. Id. at , 118 S. Ct. at 2161 (Breyer, J., dissenting).

To consider Anker's takings and due process claims, we first must decide what, if any, holding in Eastern Enterprises binds our decision. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (quoting Gregg v. Georgia, 428 U.S.153, 169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976)). However, as we recognized in Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994), and reaffirmed in Unity Real Estate, 1999 WL 167765, at *9, the Marks rule is applicable only where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." Rappa, 18 F.3d at 1057 (quoting King v. Palmer, 292 U.S. App. D.C. 362, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Thus, in cases where approaches differ, no particular standard is binding on

an inferior court because none has received the support of a majority of the Supreme Court. 18 F.3d at 1058.

As to the immediate situation, we recognized in Unity Real Estate that "Justice Kennedy's substantive due process reasoning is not a 'narrower' ground that we might take to constitute the controlling holding." 1999 WL 167765, at *9. In such a case, then, the only binding aspect of a splintered decision is its specific result, in Eastern Enterprises the Court's "holding the Coal Act unconstitutional as applied to Eastern Enterprises." Association of Bituminous Contractors, Inc. v. Apfel, 332 U.S. App. D.C. 218, 156 F.3d 1246, 1255 (D.C. Cir. 1998). Eastern Enterprises requires a finding that the Coal Act is unconstitutional as applied to Anker, then, only if Anker "stands in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." Unity Real Estate, 1999 WL 167765, at *9.[3]

Applying Eastern Enterprises in accordance with the foregoing methodology is not difficult inasmuch as its plurality and concurrence both found significant the fact that Eastern Enterprises was not a signatory to either the 1974 or 1978 NBCWAs, and thus it did not contemplate either being responsible for or contributing to the miners' expectation of lifetime benefits. The plurality recognized that while the takings inquiry is "essentially ad hoc and fact intensive" the Court, in prior decisions, had identified three factors that are particularly significant: "'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" 524 U.S. at , 118 S. Ct. at 2146 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175, 100 S. Ct. 383, 390, 62 L.

Ed. 2d 332 (1979)). The plurality then summarized its takings case law as follows:

> Our opinions . . . make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. Congress also may impose retroactive liability to some degree particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation.' Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Id. at , 118 S. Ct. at 2149 (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 731, 104 S. Ct. 2709, 2719, 81 L. Ed. 2d 601 (1984)) (internal quotation marks omitted) (emphasis added) (citation omitted).

Applying these precepts, the plurality held that the Coal Act placed a "considerable financial burden" upon Eastern Enterprises, which was liable for between $ 50 and $ 100 million in cumulative payments. Id. at , 118 S. Ct. at 2149. The plurality acknowledged that this type of financial burden was not a per se taking -- "a permanent physical occupation of . . . property" -- yet noted that the Court's decisions upholding the Multiemployer Pension Amendments Act of 1980 to supplement ERISA suggested that "an employer's

statutory liability for multiemployer plan benefits should reflect some 'proportionality to its experience with the plan.'" Id. at , 118 S. Ct. at 2149 (quoting Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 645, 113 S. Ct. 2264, 2291, 124 L. Ed. 2d 539 (1993)). The plurality found this proportionality lacking because "while Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's." Id. at , 118 S. Ct. at 2150 (emphasis added). This was significant because the 1974 and subsequent agreements "first suggested an industry commitment to the funding of lifetime health benefits for both retirees and their family members." Id. at , 118 S. Ct. at 2150. Thus, because Eastern Enterprises never had contemplated liability nor contributed to the miners' expectation of lifetime benefits, the plurality held that "the correlation between Eastern and its liability to the Combined Fund is tenuous, and the amount assessed against Eastern resembles a calculation 'made in a vacuum.'" Id. at , 118 S. Ct. at 2150 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225, 106 S. Ct. 1018, 1026, 89 L. Ed. 2d 166 (1986)).

The plurality also found the lack of proportionality significant in its analysis of whether the Coal Act substantially interfered with Eastern Enterprises' reasonable investment backed expectations, and whether the nature of the governmental action was unusual. The plurality found that the Act's "substantial and particularly far reaching" retroactive effect interfered with Eastern Enterprises' reasonable investment backed expectations. Id. at , 118 S. Ct. at 2152. It noted that inasmuch as an employer in the coal

industry could not have contemplated that it was promising lifetime benefits until 1974 when ERISA forced revisions to the 1950 Fund, the Coal Act's "scheme for allocation of Combined Fund premiums is not calibrated either to Eastern's past actions or to any agreement--implicit or otherwise--by the company." Id. at , 118 S. Ct. at 2152. Likewise, the plurality reasoned that the governmental action was highly unusual and implicated fundamental principles of fairness because it "singled out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused. . . ." Id. at , 118 S. Ct. at 2153 (emphasis added). Therefore, each factor suggesting that the application of the Coal Act was an unconstitutional taking depended upon the fact that Eastern Enterprises had left the coal industry in 1965 and had not agreed to the 1974, 1978, or subsequent wage agreements.

Justice Kennedy, in finding the Coal Act's application to Eastern Enterprises violated substantive due process, also relied upon the fact that Eastern Enterprises had not signed the 1974 or following agreements. Justice Kennedy held that "accepted principles forbidding retroactive legislation" dictated that the application of the Act to Eastern Enterprises violates the Due Process Clause. Id. at , 118 S. Ct. at 2158 (Kennedy, J., concurring in judgment and dissenting in part). Applying an "arbitrary and irrational" standard of review, Justice Kennedy pointed out that the assessment of liability against Eastern Enterprises bore no legitimate relation to the government's asserted interest in holding responsible those coal companies that created an expectation of lifetime benefits and then abandoned the industry to avoid this commitment:

> As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the National Bituminous Wage Agreement. This case is far outside the bounds of retroactivity permissible under our law.

Id. at , 118 S. Ct. at 2159 (citation omitted) (Kennedy, J., concurring in judgment and dissenting in part).

Thus, analysis of the decisions in Eastern Enterprises leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter.

We believe the fact that Anker was a signatory to "me too" agreements from the 1970s until 1984 factually distinguishes Anker's situation from that of Eastern Enterprises and compels a finding that the Act is constitutional in this instance.[4] This was, in fact, the Court of Appeals for the District of Columbia Circuit's reasoning in Association of Bituminous Contractors, 332 U.S. App. D.C. 218, 156 F.3d 1246, in upholding the application of the Act to operators similarly situated to plaintiffs here. Faced with signatory operators of the 1974 and subsequent agreements by incorporation by reference in related agreements, the court noted that "the crucial fact upon which the Eastern Enterprises plurality and Justice Kennedy relied in

concluding that Eastern's Coal Act liability was disproportionate to its past conduct and thus unfairly retroactive--namely, Eastern's departure from the coal industry in 1965--is absent in this case." 156 F.3d at 1256. The court continued: "The clear implication of each opinion in Eastern Enterprises is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." Id. at 1257. See also Unity Real Estate, 1999 WL 167765, at *29 (Aldisert, J., concurring) ("The decisive material facts in Eastern Enterprises are that the company (1) left the coal industry in 1965 and (2) was never a party to the 1974 and later Wage Agreements that first suggested the commitment to lifetime benefits for retirees and family members."). Thus, it appears that this case falls outside the specific holding of Eastern Enterprises, and we therefore find the Coal Act's application to Anker constitutional.

However, our opinion in Unity Real Estate directs us to apply an additional level of due process analysis designed to measure "the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." Id. at *10. We noted there that the proper standard of review for a due process analysis is whether Congress's action was arbitrary or irrational. Id. We concluded that Congress's determination that the coal industry acted in a way that created the miners' reasonable expectation of lifetime benefits, and that its finding that the coal companies were the most responsible parties for the deterioration of the Benefit Plans were "reasonable evaluations of the problem." Id. at *20.

We then held that the Act's retroactivity did not render it irrational in violation of due process. Id. We recognized that the "heart of retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts" and announced that "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." Id. at *20-21.

In the first step of a retroactivity analysis, we measured the length of time of the retroactivity from the date the coal company's contractual obligations ceased to the passing of the Act, and held that Unity Real Estate's 11 years was not so extensive as to violate Justice Kennedy's standard, although we admitted that it was a "close case." Id. at *21. We, however, recognized that the burden the Coal Act imposes upon parties assessed liability is substantial. Id. at *22. Finally, turning to the proportionality issue, we found that the Coal Act imposes a burden justified by both the industry's conduct that created reasonable expectations of lifetime benefits -- creating a benefit fund legally obligated to pay out more funds than the operators were required to provide -- and conduct that created the problem of underfunding -- the same initial flaws in the funding mechanism compounded by the mass exodus of operators from the industry to avoid making further contributions to the funds. Id. at *25. This analysis led us to conclude that the Coal Act did not violate the Due Process Clause because Congress was entitled to redress the problems caused by "the companies' actions, through the BCOA through which negotiations with the unions were conducted, [which] created reasonable expectations about benefits and established a funding structure vulnerable to 'dumping' retirees when companies left the industry." Id.

Applying Unity Real Estate's retroactivity analysis compels us to reach a similar conclusion here. The length of time since King Knob last agreed in a "me too" contract to abide by an NBCWA was eight years, and the length of time since King Knob agreed to an NBCWA in a contract with Consol was 11 years before Congress passed the Coal Act. We found 11 years to be acceptable, although a "close case," in Unity Real Estate. Id. at *21. Moreover, our proportionality analysis in Unity Real Estate applies full force here because King Knob was a signatory to the 1978 and subsequent NBCWAs, and thus bears the same responsibility as the plaintiffs in Unity Real Estate for creating the reasonable expectations and the problem of under-funding that the Coal Act redresses. Id. at *25.

While some language in Unity Real Estate suggests that we rested our holding on the operators' membership in the BCOA which had negotiated the agreements that created the miners' expectation of benefits, id. at *16-18, we will not read this language to allow "me too" signatures to avoid the application of the Act. King Knob agreed to abide by those same NBCWAs that the plaintiffs in Unity Real Estate negotiated.[5] Similarly, Anker's argument that its liability fails Unity Real Estate's proportionality test since King Knob was "never" responsible for contributing to the benefit funds misses the mark. Anker fails to realize that while Consol may have agreed to assume King Knob's payments to the benefit funds in its contract-mining agreements spanning 1967 to 1982, King Knob, as a "me too" signatory to the NBCWAs was responsible in the first instance for the provision of these payments. King Knob's ability to have Consol assume this obligation is simply irrelevant to the fact that by agreeing to the NBCWAs King Knob was a party to the agreements that created the miners' expectation of

lifetime benefits. King Knob benefitted as much as Consol from having the NBCWAs as those agreements kept a consistent work force in place in part by promising the provision of health and death benefits for the rest of the miners' lives.

Overall, inasmuch as nothing germane to our holding in Unity Real Estate distinguishes Anker from the plaintiffs in Unity Real Estate, application of that case's due process analysis leads us once again to conclude that the Act does not violate constitutional norms, this time as applied to the Anker. Thus, we find the Act constitutional as applied to Anker because of the factual distinction that makes Eastern Enterprises inapplicable, and because the case falls squarely under our analysis and holding in Unity Real Estate.

C. The Commissioner's Assignment of Beneficiaries to Anker

In reviewing the Commissioner's decision to assign beneficiaries to Anker, we decide whether her action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Commissioner rejected Anker's arguments that Consol was the entity responsible for providing the miners' benefits. Anker had argued to the Social Security Administration

> that assignments made [because of Anker's affiliation with King Knob] should be reassigned to Consolidation Coal Co. because King Knob operated as an independent contractor mining lands owned or leased by Consol with no ownership rights in the minerals; that amounts paid by Consol to the UMWA plans were not deducted or credited

> against the amounts paid to King Knob for the mined coal; that upon termination of the agreement in 1982 Consol accepted responsibility for current and subsequent payments to the UMWA Welfare and Retirement Fund or any successor fund based on hours worked prior to the summer of 1982; [and] that for miners employed by King Knob after 1982, responsibility should be pro-rated. . . .

App. at 33. The Commissioner instead determined that

> Under the Coal Act, ownership of a mine is immaterial to assignment decisions. Assignments are made solely on the basis of the signatory employer who employed the eligible retiree. In the case involving King Knob, an affiliate of Anker Energy, the signatory that employed the retirees was King Knob, not Consol. Also, for Coal Act purposes, SSA is not bound by any private agreements made between companies, nor does the Coal Act allow for pro-ration of premium payments between companies. In light of the foregoing, no assignments that were made to Anker on the basis of its relationship to King Knob Coal can be reassigned to Consol.

App. at 33. We will affirm the district court's grant of judgment on the pleadings on Count One upholding the Commissioner's assignment of beneficiaries to Anker, because we find that her decision was not "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Anker contends that King Knob was merely the "nominal" employer of the miners, while Consol was a signatory operator in its own right under the Act that had received "the entire economic benefit which those miners created," and was "the entity which had responsibility for all payments required to be made to the UMWA Benefit Funds." Appellants' Brief at 26. We find these contentions to be without merit.

The Coal Act directs the Commissioner to assign each eligible beneficiary to a "signatory operator" who employed the beneficiary. 26 U.S.C. § 9706(a). Section 9706(a) also attempts to ensure that the specific assignment of a beneficiary is to the most recent and significant employer still in business. The Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). The term "coal wage agreement" includes "the National Bituminous Coal Wage Agreement," as well as "any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required . . . the provision of health benefits to retirees of such employer . . . or contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof." 26 U.S.C. § 9701(b)(1). Finally, the Act provides that "employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A).

Applying these terms here, we uphold the Commissioner's conclusion that Anker is a related person to King Knob who was responsible for the provision of health benefits to the

1950 or 1974 Plans. First, King Knob was clearly a signatory operator under the Act. Anker admits that King Knob was a "me too" signatory to the 1974, 1978, 1981 and 1984 NBCWAs. App. at 8. Although it did not negotiate these agreements, as a "me too" signatory King Knob agreed to each of these NBCWAs, and agreed to contribute to the benefit funds. As such, King Knob falls under the Act. 26 U.S.C. § 9701.

Moreover, Anker does not contest the Commissioner's determination that it is a "related person" to King Knob under the Act, and we find that King Knob was without question the miners' employer. See Appellants' Brief at 26. Anker's pleadings and the record reveal as much. As an independent contractor, King Knob agreed in its contracts with Consol that

> all parties working for it in connection with the undertaking covered by this Agreement shall be its employees subject only to its orders and supervision. . . . Neither Consol nor any of its agents, servants or employees shall have the right to direct, supervise or control the manner or method in which the work is to be performed.

App. at 66. Anker confuses the matter by stating that King Knob was only the miners' "nominal" employer, and that Consol had received the entire "economic benefit" from the miners' efforts. The Act does not mention the term "nominal" employer, nor does the term have any independent meaning in the context here. Likewise, the Act does not assess premiums based upon who received the "economic benefit" of the miners' work. Moreover, we do not accept the accuracy

of Anker's denial that King Knob benefitted economically from its employees' mining efforts. After all, Consol was paying King Knob for its services.

Furthermore, we find Anker's argument unpersuasive that King Knob was not the correct signatory employer because it never had made contributions to the benefit fund inasmuch as Consol always paid King Knob's premiums according to their mining agreements. As a "me too" signatory to the 1974, 1978, 1981 and 1984 NBCWAs, King Knob was responsible for making payments for its employees to the benefit funds. Even though Consol apparently relieved King Knob of this responsibility by making all of its payments to the funds, such a contractual agreement does not lead us to conclude that King Knob was not a signatory operator responsible for making payments to the funds. Thus, we cannot say that the Commissioner's assignment of beneficiaries to Anker is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

D. Contract for Reimbursement

In granting Consol's motion for judgment on the pleadings on Count Two the district court relied upon contract and statutory interpretation in holding that Consol is not liable to reimburse Anker for payments made to the Combined Fund for the eligible retirees who worked for King Knob pursuant to its mining contracts with Consol. First, the court held that the language in the settlement agreement[6] was clear and unambiguous. Anker I at 22.

Next, the court determined that inasmuch as the contract provides for reimbursement "attributable to" either the tonnage of coal produced or the hours miners worked for

King Knob under the contracts with Consol, King Knob was entitled to reimbursement only if the premiums Anker paid to the Combined Fund were "attributable to" either factor. Id. Because the Coal Act funds health benefits, according to the district court, "by the imposition of what is, in essence, a tax," it held that Consol was not obligated to reimburse Anker for its payments. Id. at 23. The court also held that even if Consol was contractually responsible for reimbursing Anker, Anker still could not maintain its action against Consol because the Coal Act "abrogated pre-act contracts reallocating mining companies' obligations to pre-Act benefit plans." Id. at 24 n.17. We will reverse the district court's order granting judgment on the pleadings in favor of Consol on Count Two for reimbursement because we reject the district court's conclusions with respect to the count.

1. Contractual liability

Anker urges us to reverse based upon the district court's refusal to consider extrinsic evidence in light of its holding the contractual language clear and unambiguous. Appellants' Brief at 28. Under Pennsylvania law, which is applicable here, a court can consider parol evidence only if the contractual language is ambiguous. See Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1427-28 (3d Cir. 1994); Langer v. Monarch Life Ins. Co., 879 F.2d 75, 81 n.8 (3d Cir. 1989).

We hold that the district court erred in deciding that paragraph 4(b) of the settlement agreement is clear and unambiguous. The provision states that Consol will reimburse King Knob for "all subsequent payments" due to the then-current "UMWA Fund" or "any successor fund." These payments must be "attributable to" either tonnage of

coal or hours worked under the contracts. Inasmuch as the Coal Act does not assign liability based upon the amount of coal mined or hours worked by miners, the court granted Consol's motion for judgment on the pleadings.

In so doing, the court failed to acknowledge that "tonnage of coal" and "hours worked" were the methods used to determine an employer's premiums for the 1950 and 1974 Funds. By placing this language in the agreement, the parties could have been agreeing, as Anker contends, that Consol would be responsible for any payments owed to these Funds or any successor fund arising from the work performed pursuant to the mining contracts. The district court, then, failed to read the mention of "tonnage of coal" and "hours worked" consistently with industry usage.

In fact, reading the provision to bind Consol to reimburse King Knob for any future benefit payments related to the work completed under the contracts would be consistent with the parties' inclusion of the term "successor fund" in the agreement. As Anker pointed out in its brief, inasmuch as there was no "successor fund" to the UMWA Fund at the time of the settlement agreement, inclusion of this term signifies that the parties were contemplating possible responsibility for payment of future benefits to a future fund. Appellants' Brief at 33. Otherwise, inclusion of this language in the contract makes no sense.

The district court also incorrectly interpreted the contract to bar reimbursement because the Coal Act does not assess premiums based upon the tonnage of coal and hours worked. While the Coal Act does not determine specifically the premiums due based upon coal tonnage and hours worked, the Act is concerned with operators who had contributed to

the 1950 and 1974 Plans which were funded based on coal tonnage and hours worked. The Combined Fund, by its very terms, is a successor plan, born on February 1, 1993, when the Act mandated that "the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund. . . ." 26 U.S.C. § 9702(a)(2). By concentrating on the method of funding and ignoring the industry significance of coal tonnage and hours worked, the district court incorrectly held that, as a matter of law, Consol was not liable to Anker for payments made for King Knob's employees under its contracts with Consol. While we do not take a position as to Anker's ultimate success in proving that Consol is in fact liable to it for the premiums for the miners assigned to it under the Act, we conclude that the district court's disposing of the issue on the pleadings was premature, and that further proceedings with respect to it are necessary.[7]

2. Abrogation of contractual agreements

The district court followed the decision of a divided panel of the Court of Appeals for the Fourth Circuit in Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996), when it held that the Coal Act abrogates private contracts for indemnification or reimbursement. Anker I at 24 n.17. However, considering the Supreme Court's statements in Eastern Enterprises concerning the language of the Act, we will not follow Carbon Fuel. Instead, we hold that the Coal Act does not prohibit indemnification or reimbursement pursuant to previous contractual arrangements.

The Eastern Enterprises plurality stated that "the Act preserves Eastern's right to pursue indemnification," although it does not grant any new rights, including a right to

reimbursement. 524 U.S. at , 118 S. Ct. at 2150. The Court was referring to 26 U.S.C. § 9706(f)(6) which states: "Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner."

In so stating, the Supreme Court (implicitly) disagreed with Carbon Fuel, 100 F.3d 1124, where the court of appeals interpreted the Act to prohibit suits for indemnification or reimbursement based upon prior private contracts. Id. at 1133. The court of appeals relied on section 9708, which states that "all liability for contributions to the Combined Fund that arises on or after February 1, 1993, shall be determined exclusively under this chapter. . . ." The court also found persuasive excerpts from the legislative history stating that Congress "expressly intended to 'reach back' and impose obligations on signatories to the NBCWAs notwithstanding that many companies had 'bargained out of their funding obligations.'" Carbon Fuel, 100 F.3d at 1129 (quoting 138 Cong. Rec. S17566-01, S17603). Despite the fact that no language in the Act limits the scope of section 9706(f)(6), the court of appeals interpreted its preservation of private actions to apply only to "post-Act private agreements and contracts." Id. at 1134.

We cannot accept this reasoning. As the concurrence in Carbon Fuel pointed out, section 9708's statement that all liability will be determined under the Act does not abrogate a private party's liability to another private party for indemnification. Id. at 1140 (Williams, J., concurring in judgment). Instead, this provision provides that "an operator assigned Coal Act liability by the Commissioner is primarily liable and must pay into the Combined Fund, regardless of

the operator's private, pre-Act contractual rights." Id. Section 9706(f)(6), then, does not provide for the reassignment of primary liability for a signatory operator, but instead "preserves the right of private civil action for determining responsibility for assigned premiums as between contracting parties." Id. at 1141.

We agree with this reading of the Act.[8] Section 9706(f)(6) explicitly preserves a person's right "to bring a separate civil action against another person for responsibility for assigned premiums. . . ." This provision does not limit itself to post-Act contracts, and without an explicit congressional statement otherwise, we will not construe the Act to contravene the seemingly unambiguous Congressional desire to allow for private actions between parties for reimbursement or indemnification.

Moreover, we believe that our reading of the Act is, in fact, consistent with the legislative history upon which the majority in Carbon Fuel relies. While Congress no doubt wanted to "reach back" and ensure that companies could not contract out of their obligations to the Funds, the Coal Act solves this problem by making the signatory companies responsible in the first instance for premiums. Once the Commissioner correctly assigns retirees to an operator, liability to the Funds is guaranteed. Allowing for indemnification between private parties if a previous contractual agreement so provides in no way frustrates this goal. Indeed, it may further the goal by providing for an additional entity to be liable, albeit on a contractual basis, for the payments due the Fund.

We believe the correct reading of congressional intent is that Congress desired the Act to be remedial -- that Congress wanted to ensure that miners would receive the benefits the

industry promised and placed liability on the parties responsible for creating the problem in the first place. Whether these parties had contracted with other private organizations for indemnification in case of future liability is irrelevant. In fact, allowing for indemnification could provide for more complete funding inasmuch as small independent contractors such as King Knob are probably more likely to have gone out of business or to have insufficient funds to pay the sometimes substantial premiums than companies similar to Consol that owned and leased the mines.

Thus, we will reverse the district court's order granting Consol's motion for judgment on the pleadings on Count Two for indemnification and remand the count to the district court for further proceedings. The court erroneously found the contractual language clear and unambiguous, and erroneously interpreted the Coal Act to prohibit suits for indemnification or reimbursement based upon prior contractual arrangements.

E. Interest, liquidated damages, attorney's fees and costs

Finally, Anker contests the district court's assessment of interest, liquidated damages, fees and costs for its failure to provide the premiums timely by arguing that the Act does not provide for the assessment of these costs. Appellants' Brief at 38. We, however, will affirm the district court's judgment against Anker for these amounts. Anker misreads the Coal Act, as it incorporates the assessment of liquidated damages and fees available in ERISA. See Holland v. Keenan Trucking Co., 102 F.3d 736, 739 (4th Cir. 1996) (affirming without comment the district court's order awarding liquidated damages, interest, fees and costs under the Coal Act); Holland v. Robert Coal Co., 986 F. Supp. 621, 633 (D.D.C. 1997) (granting Combined Fund's motion for

summary judgment assessing liquidated damages, interest, fees and costs), aff'd, 1998 U.S. App. LEXIS 28500, 1998 WL 794832 (D.C. Cir. Oct. 16, 1998); Holland v. High-Tech Collieries, Inc., 911 F. Supp. 1021, 1031-32 (N.D.W. Va. 1996) (same); Holland v. Double G Coal Co., 898 F. Supp. 351, 356 (S.D.W. Va. 1995) (same).

Section 9721 of the Coal Act states that "the provisions of section 4301 of [ERISA] shall apply to any claim arising out of an obligation to pay any amount required to be paid by [the Coal Act] in the same manner as any claim arising out of an obligation to pay withdrawal liability under [ERISA]." 26 U.S.C. § 9721. Section 4301(b) of ERISA provides that the failure of an employer to make a timely withdrawal liability payment should be treated in the same manner as delinquent contributions. 29 U.S.C. § 1451(b). Finally, section 502 of ERISA requires a district court to award interest, liquidated damages, and reasonable attorneys' fees and costs when a plan successfully enforces a demand for delinquent payments. 29 U.S.C. § 1132(g)(2).[9]

Applying this statutory scheme to Anker, the district court correctly determined that Anker had not made contributions, and thus ERISA's enforcement provisions concerning delinquent contributions mandated the assessment of the proper fees. Anker III at 10. We find this decision clearly correct and uphold the judgment against Anker.[10]

IV. CONCLUSION

For the foregoing reasons, we will affirm the district court's order granting judgment on the pleadings on Anker's claim on Count One that the Commissioner's assignment was erroneous, and will affirm the district court's order granting summary judgment on the constitutionality of the Act as

applied to Anker and King Knob on Count Three as well as its award of liquidated damages, interest, fees and costs on the counterclaim. However, we will reverse the district court's order granting judgment on the pleadings on Anker's contractual claim for reimbursement on Count Two and will remand the case to the district court for further proceedings on that count consistent with this opinion. The parties will bear their own costs on this appeal.

Footnotes

[1] The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the case arises under the Constitution of the United States and the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. § 9701-9722, and had supplemental jurisdiction over Anker's breach of contract claim pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

[2] The district court appears to have reviewed the Commissioner's decision de novo, as was also the case in Lindsey Coal Mining, 90 F.3d at 691 n.3. However, as we noted there, inasmuch as we "come to the same decision as the district court in affirming the Commissioner's decision, any application of a different standard of review on its part was harmless." Id.

[3] We also recognized in Unity Real Estate that in light of Eastern Enterprises' concurrence and dissent, we are "bound to follow the five- four vote against the takings claim. . . ." Unity Real Estate, 1999 WL 167765, at *9. See Eastern Enters., 524 U.S. at , 118 S. Ct. 2156 (Kennedy, J., concurring) ("The Coal Act neither targets a specific property interest nor depends upon any particular property for the

operation of its statutory mechanisms."); id. at , 118 S. Ct. at 2161 (Breyer, J., dissenting) ("The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property."); also Association of Bituminous Contractors, 156 F.3d at 1254 n.5 ("The only conceivable change in takings jurisprudence brought about by Eastern Enterprises is that the five dissenting justices . . . apparently believe that the imposition of liability alone is not a taking of property under the Fifth Amendment.").

[4] The difference between a member of the BCOA and a "me too" signatory to a NBCWA is of no consequence to this case despite Anker's contrary assertions. See, e.g., Connors v. Link Coal Co., 297 U.S. App. D.C. 273, 970 F.2d 902, 903 (D.C. Cir. 1992) ("'Me too' agreements have terms identical to the terms of the national agreement, and thus there is no distinction among them concerning employers' contractual rights and obligations."); Arizona Laborers, Teamsters and Cement Masons Trust Fund v. Conquer Cartage Co., 753 F.2d 1512, 1518 (9th Cir. 1985) (defining a "me too" agreement as an agreement by which a smaller employer can obtain all the benefits of the master collective bargaining agreement without joining the industry association and incurring the costs of participating in industry negotiations or negotiating independently with the union).

[5] One of the plaintiffs in Unity Real Estate, was a "me too" signatory to the 1984 NBCWA after dropping out of the BCOA. Id. at *4.

[6] Once again, the pertinent portion of the settlement agreement states:

> (b) Consol shall promptly reimburse King Knob for all subsequent payments due to the UMWA Fund or any successor fund attributable to (i) tonnage of coal produced under the Contracts, (ii) hours worked at the mine operated under the Robinson Run Contract on or before August 31, 1982, and (iii) hours worked at the mines operated under the Booth Contract on or before June 30, 1982.

App. at 17, 97.

[7] Consol points out that King Knob retained certain employees after its agreements with it were terminated. At this time we do not deal with the significance of this fact which was not material to the district court's disposition of the reimbursement claim. Of course, paragraph 4(b) of the settlement agreement has temporal limits.

[8] Even if our reading of section 9706(f)(6) is incorrect, we believe that we would need a clearer expression of Congress's intent for us to agree with Carbon Fuel that the Coal Act abrogates an entire class of private contracts.

[9] We have held that interest, liquidated damages, fees and costs are mandatory charges in withdrawal liability cases under ERISA. See United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 134-35 (3d Cir. 1986); see also Huber v. Casablanca Indus., Inc., 916 F.2d 85, 101 n.34 (3d Cir. 1990).

[10] As the district court noted, Anker's reliance on Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co., 484 U.S. 539, 108 S. Ct. 830, 98 L. Ed. 2d 936 (1988), is sorely misplaced in light of the fact that, unlike the NLRA which was involved there, the Coal Act specifically incorporates ERISA's enforcement provisions. Anker III at 9-10.

Civil Action No. 96-1938

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANKER ENERGY CORPORATION and KING KNOB COAL CO., INC.,
Plaintiffs,

vs.

CONSOLIDATION COAL COMPANY, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND AND ITS TRUSTEES, MARTY D. HUDSON, MICHAEL H. HOLLAND, THOMAS O.S. RAND, ELLIOTT A. SEGAL, GAIL R. WILENSKY and WILLIAM P. HOPGOOD, and KENNETH S. APFEL, Commissioner of the Social Security Administration,
Defendants.

March 11, 1998, Decided

COUNSEL: For ANKER ENERGY CORPORATION, KING KNOB COAL CO., INC., plaintiffs: Jeffrey G. Brooks, Paul A. Manion, Manion, McDonough & Lucas, Pittsburgh, PA.

For ANKER ENERGY CORPORATION, KING KNOB COAL CO., INC., plaintiffs: Charles L. Woody, Spilman, Thomas & Battle, Charleston, WV.

For ANKER ENERGY CORPORATION, plaintiffs: James A. Walls, Anker Energy Corporation, Morgantown, WV.

For UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MARTY D. HUDSON, Trustee, MICHAEL H. HOLLAND, Trustee, THOMAS O.S. RAND, Trustee, ELLIOTT A. SEGAL, Trustee, CARLTON R. SICKLES, Trustee, GAIL R. WILENSKY, Trustee, WILLIAM P. HOBGOOD, Trustee, defendants: Ralph A. Finizio, Houston Harbaugh, Pittsburgh, PA.

For UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MARTY D. HUDSON, Trustee, MICHAEL H. HOLLAND, Trustee, THOMAS O.S. RAND, Trustee, ELLIOTT A. SEGAL, Trustee, CARLTON R. SICKLES, Trustee, GAIL R. WILENSKY, Trustee, WILLIAM P. HOBGOOD, Trustee, defendants: Peter Buscemi, John M. Barr, Morgan, Lewis & Bockius, David W. Allen, General Counsel, United Mine Workers of America, John R. Mooney, Elizabeth A. Saindon, Beins, Axelrod, Osborne, Mooney & Green, Washington, DC.

For SHIRLEY SEARS CHATER, defendant: Albert W. Schollaert, United States Attorney's Office, Pittsburgh, PA.

JUDGES: William L. Standish, United States District Judge.

OPINIONBY: William L. Standish

OPINION: MEMORANDUM ORDER

On February 23, 1996, plaintiffs, Anker Energy Corporation (Anker) and King Knob Coal Co., Inc. (King Knob), filed a three-count amended complaint in this civil action, seeking declaratory and injunctive relief. In Counts One and Two of the amended complaint, which were asserted against defendant Consolidation Coal Company (Consol), plaintiffs

claimed that Consol was liable for any premiums due to the defendant United Mine Workers of America Combined Benefit Fund (the Combined Fund) and the defendant Trustees on behalf of certain retirees of King Knob under the Coal Industry Retiree Health Benefits Act of 1992 (the Coal Act), 26 U.S.C. §§ 9701-9722. On May 2, 1997, Consol moved for judgment on the pleadings, pursuant to Fed.R.Civ.P. 12(c), and, by memorandum and order dated July 28, 1997, the motion was granted. [1]

In Count Three of the amended complaint, which is asserted against the Combined Fund, the defendant Trustees and the defendant Commissioner of the Social Security Administration (the Commissioner), plaintiffs assert that the assessment levied against Anker by the Combined Fund under the Coal Act to fund benefits for certain King Knob retirees violates the Fifth Amendment to the United States Constitution because it constitutes "a taking and a deprivation of private property for public use without just compensation and without due process of law." (Amended Complaint, p. 2).

On October 15, 1996, the Combined Fund and the defendant Trustees filed two counterclaims against plaintiffs in which they seek (1) a declaration that the provisions of the Coal Act as applied to plaintiffs are constitutional; and (2) a judgment for the annual premiums owed to the Combined Fund by Anker for the beneficiaries assigned to Anker under the Coal Act. (Answer and Counterclaim, pp. 12-20).

Presently, before the court is the motion of the Combined Fund and the defendant Trustees, pursuant to Fed.R.Civ.P. 56, for summary judgment as to Count Three of plaintiffs' amended complaint, as well as their counterclaims against plaintiffs, and the motion of the Commissioner for summary

judgment, pursuant to Fed.R.Civ.P. 56, as to Count Three of the amended complaint.

The legislative history of the Coal Act, as well as the facts on which the Commissioner relied in assigning certain King Knob retirees to Anker under the Coal Act, are set forth at length in the court's July 28, 1997 memorandum, granting the motion of Consol for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), and, therefore, they will not be repeated here. With respect to plaintiffs' constitutional challenges to the Coal Act, in Lindsey Coal Mining Co. v. Chater, 90 F.3d 688 (3d Cir.1996), the United States Court of Appeals for the Third Circuit was presented with similar challenges to the Coal Act, and the Third Circuit held that the Coal Act as applied to the appellant in that case did not violate substantive due process and did not amount to an unconstitutional taking.

In response to the present summary judgment motions, plaintiffs do not attempt to distinguish the Third Circuit's decision in Lindsey from the facts presented by this case. Rather, they assert that the court should defer a ruling on the motions because, on October 20, 1997, the United States Supreme Court granted a petition for writ of certiorari in the case of Eastern Enterprises v. Chater, 110 F.3d 150 (1st Cir.), cert. granted sub nom, Eastern Enterprises v. Apfel, 522 U.S. 931, 118 S. Ct. 334, 139 L. Ed. 2d 259 (1997), a "case which raises the very constitutional issues raised by plaintiffs in this case." (Brief in Opposition, p. 1).

After consideration of plaintiffs' response to the present motions for summary judgment, the court declines to defer a ruling pending a decision by the United States Supreme Court in Eastern Enterprises in light of (1) the overwhelming

weight of authority against plaintiffs' constitutional arguments, including the decision of the Third Circuit in Lindsey, which is binding on this court;[2] (2) the significant difference between the facts presented by this case and the facts presented in the Eastern Enterprises case as evidenced by the statement of questions presented on appeal;[3] and (3) the detrimental effect of any further delay in disposing of these summary judgment motions on the court's calendar.[4]

Further, based on the undisputed fact that King Knob was a signatory to "me too" agreements during the 1970s and the early 1980s, and the undisputed fact that Anker is a "related person" to King Knob for purposes of the Coal Act,[5] the court concludes that the decision of the Third Circuit in Lindsey is dispositive with respect to plaintiffs' constitutional challenges to the Coal Act. Under the circumstances, the motions of the Combined Fund, the defendant Trustees and the Commissioner for summary judgment will be granted with respect to Count Three of plaintiffs' amended complaint, and the motion of the Combined Fund and the defendant Trustees for summary judgment will be granted with respect to their first counterclaim against plaintiffs, seeking a declaration that the Coal Act is constitutional as applied to plaintiffs. However, the motion of the Combined Fund and the defendant Trustees for summary judgment will be denied with respect to the second counterclaim against plaintiffs, which seeks the entry of a judgment against plaintiffs for annual premiums, interest, liquidated damages and attorneys' fees and costs. By separate order, a hearing will be scheduled to determine the amount of the judgment to be entered against plaintiffs and in favor of the Combined Fund.

AND NOW, this 11th day of March, 1998, it is so ORDERED.

William L. Standish

United States District Judge

Footnotes

[1]On August 15, 1997, plaintiffs moved for the entry of final judgment as to Consol under Fed.R.Civ.P. 54(b), contending that there existed no reason for delay of appellate review of the disposition of the claims asserted by plaintiffs against Consol. However, the motion was denied by order dated September 11, 1997.

[2] See, e.g., Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir.1996); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir.1996); In re Blue Diamond Coal Co., 79 F.3d 516 (6th Cir.1996), cert. denied, 519 U.S. 1055, 117 S. Ct. 682, 136 L. Ed. 2d 608 (1997); Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), cert. denied, 519 U.S. 808, 117 S. Ct. 50, 136 L. Ed. 2d 14 (1996); In re Chateaugay Corp., 53 F.3d 478 (2d Cir.), cert. denied, U.S. , 116 S. Ct. 298, 133 L. Ed. 2d 204 (1995); Barrick Gold Exploration, Inc. v. Hudson, 47 F.3d 832 (6th Cir.), cert. denied, 516 U.S. 813, 116 S. Ct. 64, 133 L. Ed. 2d 26 (1995).

[3] In the petition for writ of certiorari filed in the Eastern Enterprises case, the Questions Presented on appeal are set forth as follows:

> 1. Does retroactive liability for retiree health benefits under the Coal Act violate the Due Process Clause, considering the question left open in Usery v. Turner Elkhorn, [428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752] where

> Eastern's participation in the coal industry from 1947 to 1965 did not contribute to the financial crisis that prompted Congress to enact the statute in 1992?
>
> 2. Does the Coal Act violate the Takings Clause by upsetting Eastern's investment-backed expectations and by imposing a liability out of all proportion to Eastern's "experience" between 1947 and 1965 with retiree benefit plans for coal miners?

(Reply Brief of the Combined Fund and defendant Trustees, Exh. B).

In contrast, Anker was assigned responsibility for premium payments for certain retired King Knob coal miners based on its status as a "related person" to King Knob, who was a signatory to "me too" agreements during the 1970s and the early 1980s, which is clearly a much later period of time.

[4] It should also be noted in connection with plaintiffs' request that the court defer a ruling on the present summary judgment motions that an appeal by plaintiffs will be certain to follow an adverse ruling on their constitutional challenges to the Coal Act based on the amount of money at stake, as well as their attempt to immediately appeal the court's ruling on Consol's motion for judgment on the pleadings. It is very unlikely that a decision in connection with any appeal filed by plaintiffs in this case will be rendered by the Third Circuit before the United States Supreme Court issues its decision in the Eastern Enterprises case.

[5] An affiliate of Anker acquired King Knob in 1975. (Brief in Opposition, p. 3, n.1). Therefore, under the Coal Act, Anker is considered a "related person" to King Knob.

MEMORANDUM ORDER

In this civil action, plaintiffs, Anker Energy Corporation (Anker) and King Knob Coal Co., Inc. (King Knob), filed a three-count amended complaint on February 23, 1996, action, seeking declaratory and injunctive relief. In Counts One and Two of the amended complaint, which were asserted against defendant Consolidation Coal Company (Consol), plaintiffs claimed that Consol was liable for any premiums due to the defendant United Mine Workers of America Combined Benefit Fund (the Combined Fund) and the defendant Trustees on behalf of certain retirees of King Knob under the Coal Industry Retiree Health Benefits Act of 1992 (the Coal Act), 26 U.S.C. §§ 9701-9722.[1]

On May 2, 1997, Consol moved for judgment on the pleadings, pursuant to Fed.R.Civ.P. 12(c), and, by memorandum and order dated July 28, 1997, the motion was granted. Presently, before the court is Consol's motion for sanctions, under Fed.R.Civ.P. 11, against plaintiffs and their counsel. In summary, Consol contends (1) that the complaint in this action was filed to harass Consol, generate substantial litigation costs and coerce Consol into a settlement of plaintiffs' claims in violation of Rule 11(b)(1); (2) that plaintiffs' legal contentions were "unsupportable under the existing state of the law and no meaningful argument can be made for the modification or reversal of that law under the facts of this case" in violation of Rule 11(b)(2); and (3) that plaintiffs' factual contentions are "simply untrue and

unsupportable by any evidence" in violation of Rule 11(b)(3). (Motion, pp. 2-3).

After consideration of Consol's motion, as well as the briefs and evidentiary material submitted in support of and in opposition to the motion, the court concludes that the motion will be denied. Although, in the court's opinion, the claims asserted by plaintiffs in Counts One and Two of their amended complaint were weak, the court declines to find that they were filed for an improper purpose or that the legal contentions were totally unwarranted or that the factual contentions were totally lacking in evidentiary support or that this case presents exceptional circumstances, justifying Rule 11 sanctions.

AND NOW, this 11th day of March, 1998, it is so ORDERED.
William L. Standish

United States District Judge

ORDER

AND NOW, this 11th day of March, 1998, it is hereby ORDERED that a hearing on the amount of annual premiums and interest due to the defendant United Mine Workers of America Combined Benefit Fund and the defendant Trustees from plaintiff Anker Energy Corporation under the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. §§ 9701-9722, as well as the amount of liquidated damages and attorneys' fees and costs, if any, to be awarded to the defendant United Mine Workers of America Combined Benefit Fund and the defendant Trustees from plaintiff Anker Energy Corporation, is scheduled for Friday, March 20, 1998

at 2:00 p.m., Courtroom No. 6, United States Courthouse, Pittsburgh, Pennsylvania.

William L. Standish

United States District Judge

Footnotes

[1] In Count Three, which was asserted against the United Mine Workers of America Combined Benefit Fund, its Trustees and the Commissioner of the Social Security Administration, plaintiffs challenged the constitutionality of the Coal Act as applied to Anker. Based on the overwhelming weight of authority upholding the constitutionality of the Coal Act against similar attacks, the motions of these defendants for summary judgment, pursuant to Fed.R.Civ.P. 56, as to Count Three of plaintiffs' amended complaint were granted.

Civil Action No. 96-1938

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANKER ENERGY CORPORATION and KING KNOB COAL CO., INC.,
Plaintiffs,

vs.-

CONSOLIDATION COAL COMPANY, UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND AND ITS TRUSTEES, MARTY D. HUDSON, MICHAEL H. HOLLAND, THOMAS O.S. RAND, ELLIOTT A. SEGAL, GAIL R. WILENSKY and WILLIAM P. HOPGOOD, and JOHN J. CALLAHAN, Acting Commissioner of the Social Security Administration,
Defendants.

July 25, 1997, Decided

COUNSEL: For ANKER ENERGY CORPORATION, KING KNOB COAL CO., INC., plaintiffs: Jeffrey G. Brooks, Paul A. Manion, Manion, McDonough & Lucas, Pittsburgh, PA.

For ANKER ENERGY CORPORATION, KING KNOB COAL CO., INC., plaintiffs: Charles L. Woody, Spilman, Thomas & Battle, Charleston, WV.

For ANKER ENERGY CORPORATION, plaintiff: James A. Walls, Anker Energy Corporation, Morgantown, WV.

For CONSOLIDATION COAL COMPANY, defendant: H. Yale Gutnick, E. J. Strassburger, Murray E. Petrikis, David A. Strassburger, Strassburger, McKenna, Gutnick & Potter, Robert M. Vukas, Consol Inc., Pittsburgh, PA.

For UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MARTY D. HUDSON, Trustee, MICHAEL H. HOLLAND, Trustee, THOMAS O.S. RAND, Trustee, ELLIOTT A. SEGAL, Trustee, CARLTON R. SICKLES, Trustee, GAIL R. WILENSKY, Trustee, WILLIAM P. HOBGOOD, Trustee, defendants: Ralph A. Finizio, Houston Harbaugh, Pittsburgh, PA.

For UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, MARTY D. HUDSON, Trustee, MICHAEL H. HOLLAND, Trustee, THOMAS O.S. RAND, Trustee, ELLIOTT A. SEGAL, Trustee, CARLTON R. SICKLES, Trustee, GAIL R. WILENSKY, Trustee, WILLIAM P. HOBGOOD, Trustee, defendants: Peter Buscemi, John M. Barr, Morgan, Lewis & Bockius, David W. Allen, General Counsel, United Mine Workers of America, John R. Mooney, Elizabeth A. Saindon, Beins Axelrod, Osborne, Mooney & Green, Washington, DC.

For SHIRLEY SEARS CHATER, defendant: Albert W. Schollaert, United States Attorney's Office, Pittsburgh, PA.

JUDGES: William L. Standish, United States District Judge.

OPINIONBY: William L. Standish

OPINION: MEMORANDUM

I

In their three-count amended complaint, plaintiffs, Anker Energy Corporation (Anker) and King Knob Coal Co., Inc. (King Knob), seek declaratory and injunctive relief, asserting that defendant Consolidation Coal Company (Consol) is liable for any premiums due to defendant United Mine Workers of America Combined Benefit Fund and its trustees (the Combined Fund) on behalf of certain retirees of King Knob under the Coal Industry Retiree Health Benefits Act of 1992 (the Coal Act), 26 U.S.C. §§ 9701-9722, and that the assessment levied against Anker by the Combined Fund under the Coal Act violates the Fifth Amendment to the United States Constitution.[1] Presently, before the court is the motion of Consol for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) as to Counts One and Two of plaintiffs' amended complaint.[2] For the reasons set forth below, the motion will be granted.

II

In summary, plaintiffs' amended complaint alleges the following facts:

Parties

Anker and King Knob are Delaware and West Virginia corporations, respectively, with their principal places of business in Morgantown, West Virginia. Consol is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. The Combined Fund, an employee benefit plan, was created, and its trustees appointed, under

Section 9702 of the Coal Act. The principal place of business of the Combined Fund is located in Washington, D.C. Defendant John J. Callahan is the Acting Commissioner of the Social Security Administration (SSA), which is the agency responsible for assignment of financial responsibility for payment of benefits to coal industry retirees pursuant to the Coal Act.[3] The SSA maintains its principal place of business in Baltimore, Maryland.

Genesis of the Coal Act and the Combined Fund

As a result of a collective bargaining agreement and the Employee Retirement Income Security Act of 1974,[4] the Bituminous Coal Operators' Association (BCOA) and the United Mine Workers of America (UMWA) made provisions for benefits to covered employees from the UMWA Welfare and Retirement Fund of 1950 (the 1950 Fund). Pursuant to the terms of the 1974 National Bituminous Coal Wage Agreement, the BCOA and the UMWA agreed to separate the pension benefit component of the 1950 Fund from the health and death benefit components, and the 1950 Fund was divided into the following separate trusts: (1) the 1950 Pension Trust; (2) the 1950 Benefit Plan; (3) the 1974 Pension Trust; and (4) the 1974 Benefit Plan (collectively, the 1950 and 1974 Plans).

Due to concerns over the viability of the 1950 and 1974 Plans, Congress enacted the Coal Act as part of the Energy Policy Act of 1992. The Coal Act guaranteed continued lifetime health and death benefits to UMWA retirees, surviving spouses and dependents who were receiving benefits under the 1950 and 1974 Plans as of July 20, 1992. Pursuant to Section 9702 of the Coal Act, a seven-member board of trustees created the Combined Fund,[5] and, on

February 1, 1993, the 1950 and 1974 Plans were merged into the Combined Fund.

National Bituminous Coal Wage Agreements

The UMWA is a labor organization that represents certain coal miners and retired coal miners for purposes of collective bargaining. The BCOA is a private, voluntary association that represents member companies in multi-employer collective bargaining with the UMWA. At all relevant times, Consol was a member of the BCOA.

Since 1950, the UMWA and the BCOA have been parties to a series of collective bargaining agreements known as the National Bituminous Coal Wage Agreements (NBCWAs). The NBCWAs have governed the terms and conditions of employment for UMWA-represented employees of (1) employers who chose to be members of the BCOA during the term of one or more of the NBCWAs; and (2) employers who were not BCOA members nor NBCWA signatories but who nevertheless agreed to be bound by the terms of the NBCWAs. The latter employers are commonly known as "me too" companies.

Anker has never been a member of the BCOA nor is it a signatory to any NBCWA or "me too" agreement. King Knob signed "me too" agreements during the 1970s and early 1980s. The last collective bargaining agreement executed by King Knob was a "me too" agreement in 1984. At all relevant times, Consol has been and is presently a signatory to the NBCWAs. Consol is also a leading member of the BCOA.

History of the UMWA Funds

The 1950 Fund was established by the UMWA and the BCOA pursuant to the terms of the 1950 NBCWA. This employer-funded benefits program was the exclusive source of pension, health and other benefits for all UMWA miners, retirees and their dependents. From 1950 through 1974, each NBCWA signatory was obligated to contribute to the 1950 Fund at the amount per ton specified in each NBCWA.

The 1950 Plans were designed to provide pension, health and death benefits to all UMWA-represented miners who retired before January 1, 1976, and the 1974 Plans were designed to provide pension, health and death benefits for active UMWA-represented miners and all UMWA-represented miners who retired on or after January 1, 1976. The 1974 NBCWA, and every NBCWA thereafter, obligated signatory employers to contribute to the 1950 and 1974 Plans. Contribution rates varied in each NBCWA but generally involved rates based on the tons of coal the signatory employer produced and procured for use or sale or the hours the employees of the signatory employer worked under the applicable wage agreement.

In 1978, the structure of the 1974 Benefit Plan was changed. [6] The 1978 NBCWA required signatory operators to provide health benefits to their active UMWA miners and to their UMWA retirees eligible to receive benefits from the 1974 Benefit Plan through each operator's own individual employer plan (IEP). The 1974 Benefit Plan remained in effect solely to provide health benefits to "orphan miners," i.e., any UMWA-represented miner who retired on or after January 1, 1976, but did not receive health benefits from the former signatory employer because that employer was no longer in business or no longer a signatory to the then current NBCWA.

The 1974 NBCWA, and each successor NBCWA, expressly obligated those employers who chose to sign a NBCWA to contribute to the 1950 and 1974 Plans. The 1978 NBCWA, and each successor agreement, also expressly obligated signatory employers to guarantee the health and pension benefits to be provided under the 1950 and 1974 Plans and the employers' IEP for the duration of that particular NBCWA.

Since 1978, UMWA-represented miners and retirees, their spouses and certain dependents have received health benefits as follows:

> (1) active UMWA-represented employees, their spouses and certain dependents receive health benefits from the employee's signatory employer;
>
> (2) UMWA-represented retirees who retired before December 6, 1974, their [*10] spouses and certain dependents receive health benefits from the 1950 Benefit Plan;
>
> (3) UMWA-represented retirees who retired on or after December 6, 1974 and before January 1, 1976, their spouses and certain dependents receive health benefits from which of the 1950 or 1974 Plans that the retiree selected; and
>
> (4) UMWA-represented retirees who retired on or after January 1, 1976, their spouses and certain dependents receive health benefits from the retiree's last employer under the

employer's IEP, unless that employer is no longer in business or no longer a signatory to the NBCWA in which case coverage is provided by the 1974 Benefit Plan.

Assessment of Anker under the Coal Act

As a result of an increase in health benefit levels paid by the 1950 and 1974 Plans, a change from a tonnage-based to an hours-based funding formula, a decrease in revenues resulting from increased worker productivity reducing labor hours, the expansion of the class of eligible beneficiaries and a decrease in contributions, the 1950 and 1974 Plans experienced deficits in 1988 and 1990.

Pursuant to Section 9703 of the Coal Act, the trustees of the Combined Fund are to ensure that beneficiaries who were receiving health benefits from the 1950 and 1974 Plans as of July 20, 1992 continue to receive (1) health benefits which, to the maximum extent feasible, are substantially the same as the collectively bargained for health benefits provided under the 1950 and 1974 Plans as of January 1, 1992; and (2) death benefits which are identical to the collectively bargained for death benefits provided under the 1950 and 1974 Plans as of January 1, 1992. The benefits are to be financed primarily through the assessment and collection of premiums from signatories to past NBCWAs.

The Coal Act divides beneficiaries into two groups: (1) assigned beneficiaries, i.e., those UMWA retirees who worked for a signatory to the 1988 NBCWA or any pre-1988 NBCWA between 1950 and 1974 and the retirees' spouses and certain dependents; and (2) unassigned beneficiaries, i.e., those UMWA retirees who worked for a signatory who no

longer exists but at one time was signatory to a NBCWA and the retirees' spouses and certain dependents.

In August, 1994, Congress amended the Coal Act. Prior to that amendment, the Secretary of Health and Human Services was vested with authority to assign beneficiaries to signatory employers, and the Secretary delegated that responsibility to the Commissioner of the SSA. Pursuant to the 1994 amendment and effective March 31, 1995, the Commissioner was authorized by Congress to assign beneficiaries to employers for purposes of calculating and assessing premiums to be paid to the Combined Fund, thereby divesting the Secretary of Health and Human Services of that authorization.

Pursuant to Sections 9704 and 9706 of the Coal Act, the Commissioner is required to assign the unassigned beneficiaries under the Coal Act to the last signatory employer still in business and to assess annual premiums against all such employers that have been assigned beneficiaries. The annual premium consists of a health benefit premium, a death benefit premium and an unassigned beneficiaries premium.

Under the Coal Act, retirees and beneficiaries are assigned to any signatory operator that employed the miner. If the signatory operator is no longer in business, the miners are assigned to a "related person" to the signatory operator who is still in business. By notices dated March 30, 1994 and June 30, 1995, Anker, as a "related person" to King Knob, was informed by various regional offices of the SSA that, pursuant to the Coal Act, it had been assigned liability for a number of retired miners, surviving spouses and dependents and a number of unassigned beneficiaries due to its

relationship with King Knob. (Amended Complaint, Exh. A). Anker has been assigned approximately 189 miners, spouses and dependents based upon King Knob's contract mining agreements with Consol. [7]

Promptly upon receipt of the notices of assignment from the SSA's regional offices, Anker protested the assignments of the beneficiaries to it, and it specifically preserved its right to pursue all remedies available to challenge the assignments, notwithstanding its requests for reconsideration. The SSA's Northeastern Program Service Center, one of the regional offices that had forwarded a notice of assignment to Anker, advised Anker that the assignment of 52 of the beneficiaries cannot be the subject of further appeal or review. (Amended Complaint, Exh. B). With respect to the remaining beneficiaries, Anker requested reconsideration of the assignments in July, 1995, promptly upon receipt of the assignment notices. The SSA has failed to take any action in response to Anker's protest of those assignments. Thus, Anker has exhausted the limited rights available to it in the SSA administrative process.

In accordance with the Commissioner's decision with respect to certain of the beneficiaries assigned to Anker and the SSA's failure to take any review action in connection with the assignment of financial responsibility for the other beneficiaries, the Combined Fund, by means of a memorandum dated October 18, 1995, assessed monthly premiums against Anker for these assignees and unassigned beneficiaries of approximately $ 141,000.00 through October, 1996. The amount of the assessment thereafter shall be determined by the Combined Fund from time to time until the last such beneficiary is deceased or otherwise no longer is eligible for benefits.

(Amended Complaint, pp. 1-12).

III

In ruling on a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c), the court must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. Under Rule 12(c), judgment will not be granted "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." See Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290 (3d Cir.1988), citing, Society Hill Civic Association v. Harris, 632 F.2d 1045, 1054 (3d Cir.1980). Keeping this standard in mind, the court turns to Consol's motion.

IV

A

Consol owned or controlled the coal underlying two properties in West Virginia described by the parties in their pleadings as the Booth and Robinson Run properties, and, in the mid-1970's, Consol entered into two contract mining agreements with King Knob under which King Knob was to extract the coal underlying the Booth and Robinson Run properties. (Consol's Answer, Exhs. 1 and 2).

In Count One of plaintiffs' amended complaint, plaintiffs allege that, pursuant to the Booth and Robinson Run contract mining agreements, as well as collective bargaining agreements between Consol and the UMWA, "Consol agreed to pay and did pay into the 1950 and 1974 Plans contributions

based upon the tonnage [of coal] produced and hours worked by employees of King Knob." Plaintiffs further allege that, based on these contributions, "Consol became--and is--the "signatory employer" for purposes of the 1950 and 1974 Plans with respect to King Knob's employees." (Amended Complaint, P 36). [8] Because it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim that the coal industry retirees in question should be assigned to Consol for Coal Act purposes, the court concludes that Consol is entitled to a judgment in its favor as a matter of law as to Count One.

Under the Coal Act, the Commissioner is required to assign each coal industry retiree, who is an eligible beneficiary, to a signatory operator who employed the coal industry retiree in the order prescribed in Section 9706(a), and the term "signatory operator" is defined in Section 9701(c)(1) as "a person which is or was a signatory to a coal wage agreement." If possible, the assignment of liability for annual health benefit premiums is made to the "last signatory operator" of the coal industry retiree, which is defined in Section 9701(c)(4) as "a signatory operator which was the most recent coal industry employer of such retiree." If the applicable signatory operator is no longer in business, the retiree is assigned to a company that is a "related person" to the signatory operator.[9]

In the present case, it is undisputed that King Knob was a signatory to one or more coal wage agreements covering its employees at Consol's Booth and Robinson Run properties, and that Anker is a "related person" to King Knob as defined in the Coal Act. (Amended Complaint, PP 16 and 41). Therefore, the only issue for determination with respect to

Count One is whether the Commissioner properly determined that Anker, rather than Consol, should be assigned responsibility for King Knob's retirees under the Coal Act.

Plaintiffs allege that Consol should be considered the employer of King Knob's retirees on the basis of Consol's agreement to pay on King Knob's behalf, during the term of each contract mining agreement, the contributions that King Knob as the employer of the miners in question was required to pay to the 1950 and 1974 Plans. This argument is fatally flawed, however, because it fails to recognize that Consol's assumption of responsibility to make such payments was based on its contractual obligations to King Knob, rather than the existence of an employment relationship between Consol and the miners who worked the Booth and Robinson Run properties, and liability for annual health benefit premiums is assigned under the Coal Act solely on the basis of employment of a coal industry retiree, regardless of who made payments to the 1950 and 1974 Plans on behalf of such retiree.[10]

Section 9708 of the Coal Act provides, in relevant part, that "all liability for contributions to the Combined Fund that arises on or after February 1, 1993 shall be determined exclusively under this chapter...." (emphasis added). Based on this provision, the court concludes that the Commissioner would not be bound by the contract mining agreements between King Knob and Consol, and that the Commissioner properly assigned the coal industry retirees at issue to Anker as a "related person" to King Knob. n11 As to plaintiffs' allegation that Consol made contributions to the 1950 and 1974 Plans on behalf of King Knob employees for the work performed at the Booth and Robinson Run properties under its collective bargaining agreements with the UMWA,

assuming that this allegation is true, [12] this fact would be equally unavailing for the reasons stated above in connection with the contract mining agreements. Such contributions would be based on a contractual obligation, rather than an employment relationship, and assignments of liability for annual health benefit premiums for coal industry retirees under the Coal Act are made on the basis of employment relationships.

Assuming, arguendo, that the contract mining agreements for Consol's Booth and Robinson Run properties were relevant to the issue of who should be assigned King Knob's retirees under the Coal Act, the court nevertheless concludes that the Commissioner properly assigned such retirees to Anker. Under Pennsylvania law, if a written contract is clear and unambiguous, the court construes the contract as a matter of law by its contents alone. See, e.g., Kiewit Eastern Co., Inc. v. L & R Const. Co., Inc., 44 F.3d 1194, 1199 (3d Cir.1995). [13] In this regard, the Booth contract mining agreement states in relevant part:

* * *

V. General Terms and Conditions

* * *

4. Contractor shall do the work covered by this Agreement according to its own means and methods and it is understood and agreed that it is an independent contractor and that all parties working for it in connection with the undertaking covered by this Agreement shall be its employees subject only to its orders and

supervision and shall be paid directly by [King Knob]. [King Knob] shall be responsible in all respects for the hiring, employment and working conditions of all individuals engaged to carry on the operations on the Booth Properties. Neither Consol nor any of its agents, servants or employees shall have the right to direct, supervise or control the manner or method in which the work is to be performed. Consol, however, reserves the right unto itself and its agents or representatives to inspect the work merely for the purpose of determining whether such work is being done in conformity with this Agreement.

* * *

6. [King Knob] shall carry black lung insurance and workmen's compensation insurance, shall comply with the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, and shall pay all unemployment, social security, and all other taxes which may be levied or assessed because of its operations hereunder, except real estate taxes assessable against the coal or surface lands upon which [King Knob] is granted the right herein to conduct its operations or severance taxes, if any levied upon the coal produced therefrom.

* * *

(Consol's Answer, Exh. 1).

Similarly, the Robinson Run contract mining agreement states in relevant part:

* * *

> 6. King [Knob] intends that its employees shall be members of the United Mine Workers of America and it shall be a signatory to the then current National Bituminous Coal Wage Agreement. King [Knob] agrees to pay persons employed by it in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended, and to keep all such records as are required by said Act, that it shall pay social security and unemployment insurance taxes, black lung benefits, and shall comply with all state and federal regulations pertaining to employment in the coal mining industry, and shall keep during the term of this Agreement and when reasonably requested by Consol shall make available to Consol supporting records showing evidence of its compliance with such laws and regulations and the requirements herein set out.

* * *

> 14. King [Knob] is and shall operate for Consol hereunder as an independent contractor. All persons working for King [Knob] in connection with the undertakings covered by this Agreement shall be employed by it and by its agents and employees, subject

> only to its orders and directions, and shall be paid directly by King [Knob]. Consol shall have no control or authority whatsoever over any of King Knob's said employees.
>
> * * *

(Consol's Answer, Exh. 2).

Based on the clear and unambiguous language of the contract mining agreements, King Knob was retained by Consol as an independent contractor to mine its Booth and Robinson Run properties, and the miners working at these properties were to be considered the employees of King Knob.[14] Under the circumstances, the court concludes that the contract mining agreements do not support plaintiffs' claim that the Commissioner improperly assigned King Knob's retirees to Anker under the Coal Act, and judgment will be entered in favor of Consol and against plaintiffs on Count One.

B

In Count Two, plaintiffs allege that, under paragraph 4(b) of a 1982 settlement agreement between King Knob and Consol resulting from Consol's termination of the Booth and Robinson Run contract mining agreements, Consol is liable for all amounts assessed against Anker by the Combined Fund under the Coal Act "for all King Knob retirees and miners who worked for King Knob prior to June 30, 1982 on the Booth contract and prior to August 31, 1982 on the Robinson Run contract." [15] Paragraph 4(b) provides as follows:

> * * *

> (b) Consol shall promptly reimburse King Knob for all subsequent payments due to the UMWA Fund or any successor fund attributable to (i) tonnage of coal produced under the Contracts, (ii) hours worked at the mine operated under the Robinson Run Contract on or before August 31, 1982, and (iii) hours worked at the mines operated under the Booth Contract on or before June 30, 1982.
>
> * * *

(Consol's Answer, Exh. 3).

As with the provisions of the Booth and Robinson Run contract mining agreements concerning the employer of the miners who worked those properties, the court concludes that paragraph 4(b) of the 1982 settlement agreement between Consol and King Knob is clear and unambiguous, and, therefore, the court declines to consider the extrinsic evidence offered by plaintiffs in opposition to Consol's motion for judgment on the pleadings with respect to Count Two of the amended complaint. The court further concludes that, based on this clear and unambiguous language, Consol is not liable to Anker as a matter of law for the annual health benefit premiums assessed against Anker by the Combined Fund for King Knob's retirees.

In order for Anker to be indemnified by Consol for premiums paid to the Combined Fund under the terms of the 1982 settlement agreement between Consol and King Knob, those premiums would have to be "attributable to" the tonnage of

coal produced and the number of hours worked under the contract mining agreements, and the Combined Fund is not a successor fund which requires premium payments based on the tonnage of coal produced or the number of hours worked by a signatory operator's employees. [16] Rather, under the Coal Act, health benefits are funded by the imposition of what is, in essence, a tax. See Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir.1996)(While the Coal Act maintained similar benefits to those provided previously, it entirely changed the mechanism for funding those benefits by imposing a tax. That tax rejected the previous methods for funding health-care benefits based on operational formulas, i.e., tons of coal mined and hours worked, achieved through collective bargaining in favor of statutory assessments which in certain instances "reach back" to companies that have left the coal business or bargained out of their prior obligations.) Accordingly, Consol is also entitled to a judgment in its favor as a matter of law as to Count Two of plaintiffs' amended complaint.[17]

An order follows.

ORDER

AND NOW, this 25th day of July, 1997, in accordance with the foregoing memorandum, it is ORDERED that the motion of defendant Consolidation Coal Company for judgment on the pleadings be, and hereby is, granted. The Clerk shall enter judgment in favor of defendant Consolidation Coal Company and against plaintiffs, Anker Energy Corporation and King Knob Coal Co., Inc.

William L. Standish
Footnotes

[1] The Combined Fund has filed two counterclaims against plaintiffs in which it seeks a declaration that the provisions of the Coal Act as applied to plaintiffs are constitutional and a judgment for the annual premiums owed to the Combined Fund by Anker for the beneficiaries assigned to Anker under the Coal Act. (Answer and Counterclaim, pp. 12-20).

[2] With respect to Count Three of plaintiffs' amended complaint in which it is asserted that the Coal Act as applied to plaintiffs is unconstitutional because it constitutes a taking of property for public use without just compensation and without due process of law, this count is asserted against the Combined Fund, its trustees and the Commissioner of the Social Security Administration. Therefore, Consol has moved for judgment in its favor only as to Counts One and Two. No dispositive motion has been filed by any party with respect to Count Three of plaintiffs' amended complaint.

[3] At the time of the filing of plaintiffs' original complaint in this action, Shirley S. Chater was the Commissioner of the SSA. Effective March 1, 1997, President Clinton appointed John J. Callahan to succeed Shirley S. Chater, and he is presently serving as the Acting Commissioner of the SSA.

[4] 29 U.S.C. §§ 1001 et seq.

[5] The trustees of the Combined Fund are defendants Marty O. Hudson, Michael H. Holland, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, Gail R. Wilensky and William P. Hobgood.

[6] Retirees covered under the 1950 Benefit Plan were not affected by the changes to the 1974 Benefit Plan.

[7] The two contract mining agreements at issue in this case are attached to Consol's answer to plaintiffs' amended complaint as Exhibits 1 and 2.

[8] Based on these allegations, plaintiffs request, inter alia, that the Combined Fund and its trustees be enjoined from collecting annual health benefit premiums from Anker under the Coal Act for these coal industry retirees, and that the court enter a declaratory judgment that the Commissioner be directed to assign these coal industry retirees to Consol.

[9] The term "related person" is defined in Section 9701(c)(2) of the Coal Act.

[10] Clearly, such payments were additional compensation to King Knob for the performance of its obligations under the contract mining agreements, and it is difficult to perceive how Consol's agreement to make such payments on King Knob's behalf converted King Knob's employees into employees of Consol.

[11] This conclusion is in accord with the reasons stated by the Assistant Regional Commissioner of the SSA of the Northeastern Program Service Center for denying Anker's request for review of the miners assigned to Anker by that regional office. Specifically, she states in the decision that Coal Act "assignments are made solely on the basis of the signatory employer who employed the eligible retiree," and, for Coal Act purposes, the "SSA is not bound by any private agreements made between companies." (Amended Complaint, Exh. B).

[12] Consol denies the truth of this allegation; however, it recognizes that the allegation must be taken as true for

purposes of ruling on its motion for judgment on the pleadings. (Brief in Support, p. 15).

[13] With respect to the law to be applied in this case, the Booth contract mining agreement does not contain a choice of law provision, and the Robinson Run contract mining agreement provides that the agreement shall be governed by and construed under the laws of the State of West Virginia. However, the parties agree that, because Pennsylvania law and West Virginia law do not differ regarding the relevant law of contract construction and interpretation, the court need not engage in a choice of law analysis. (Brief in Support, p. 20 fn10, Brief in Opposition, p. 9 fn3).

[14] In an attempt to avoid an adverse judgment against them on Count One, plaintiffs submitted the affidavit of John J. Faltis, Anker's President, to show the history of plaintiffs' relationship with Consol. However, because the court concludes that the language of the contract mining agreements is clear and unambiguous, the court declines to consider this extrinsic evidence. See, e.g., Carmichaels Arbors Associates v. U.S. Through Dept. of Housing and Urban Development, 789 F. Supp. 683 (W.D.Pa.1992) (If a contract's provisions are unambiguous, court must enforce terms as written).

[15] The 1982 settlement agreement between Consol and King Knob is attached to Consol's answer as Exhibit 3.

[16] Based on the court's conclusion that Anker is not entitled to be indemnified by Consol for the premiums assessed against it by the Combined Fund based on the clear and unambiguous language of paragraph 4(b) of the 1982 settlement agreement, the court declines to address Consol's alternative argument

that the Combined Fund is not a "successor fund" to the UMWA Fund. (Brief in Support, p. 18).

[17] Assuming, arguendo, that the court had determined that Anker was entitled to be indemnified under paragraph 4(b) of the 1982 settlement agreement between Consol and King Knob or that the provision was ambiguous, Consol would nevertheless be entitled to a judgment in its favor as a matter of law as to Count Two because the court is persuaded by the reasoning of the United States Court of Appeals for the Fourth Circuit in Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir.1996) that the Coal Act abrogated pre-act contracts reallocating mining companies' obligations to pre-Act benefit plans. In reaching this conclusion, the court is mindful of the decision of the United States District Court for the District of Massachusetts in Eastern Enterprises v. Shalala, 942 F. Supp. 684 (D.Mass.1996), which was affirmed by the United States Court of Appeals for the First Circuit, 110 F.3d 150 (1st Cir.1997), which appears to reach a contrary result.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**U.S. Const. Amend. V:**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Coal Industry Retiree Health Benefit Act of 1992:**
**26 U.S.C. § 9701.**
**Definitions of general applicability**
**(a) Plans and funds.**—For purposes of this chapter—
**(1) UMWA Benefit Plan.—**
**(A) In general.**—The term "UMWA Benefit Plan" means a plan—
(i) which is described in section 404(c), or a continuation thereof; and
(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.
**(B) 1950 UMWA Benefit Plan.**—The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.
**(C) 1974 UMWA Benefit Plan.**—The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

**(2) 1950 UMWA Pension Plan.**—The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

**(3) 1974 UMWA Pension Plan.**—The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

**(4) 1992 UMWA Benefit Plan.**—The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

**(5) Combined Fund.**—The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

**(b) Agreements.**—For purposes of this section—

**(1) Coal wage agreement.**—The term "coal wage agreement" means—

**(A)** the National Bituminous Coal Wage Agreement, or

**(B)** any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

**(2) Settlors.**—The term "settlors" means the United Mine Workers of America and the Bituminous Coal

Operators' Association, Inc. (referred to in this chapter as the "BCOA").

**(3) National Bituminous Coal Wage Agreement.**—The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

**(c) Terms relating to operators.**—For purposes of this section—

**(1) Signatory operator.**—The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

**(2) Related persons.—**

**(A) In general.**—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

**(B) Time for determination.**—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be

determined as of the time immediately before such operator ceased to be in business.

**(3) 1988 agreement operator.**—The term "1988 agreement operator" means—

**(A)** a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

**(B)** an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

**(C)** an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

**(4) Last signatory operator.**—The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

**(5) Assigned operator.**—The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

**(6) Operators of dependent beneficiaries.**—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

**(7) Business.**—For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

**(d) Enactment date.**—For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

**26 U.S.C. § 9702. Establishment of the United Mine Workers of America Combined Benefit Fund**

**(a) Establishment.—**

**(1) In general.**—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

**(2) Merger of retiree benefit plans.**—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

**(3) Treatment of plan.**—The Combined Fund shall be—

**(A)** a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

**(B)** an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

**(C)** a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

**(4) Tax treatment.**—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

**(b) Board of trustees.—**

**(1) In general.**—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

**(A)** one individual who represents employers in the coal mining industry shall be designated by the BCOA;

**(B)** one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

**(C)** two individuals designated by the United Mine Workers of America; and

**(D)** three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

**(2) Successor trustees.**—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

**(3) Special rules.—**

**(A) BCOA.**—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

**(B) Former signatories.**—The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and

such trustee and any successor shall serve until November 1, 1993.

**(c) Plan year.**—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

**26 U.S.C. § 9703. Plan benefits**

**(a) In general.**—Each eligible beneficiary of the Combined Fund shall receive—

**(1)** health benefits described in subsection (b), and

**(2)** in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

**(b) Health benefits.—**

**(1) In general.**—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

**(2) Plan payment rates.—**

**(A) In general.**—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the

total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

**(B) Reductions.**—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

**(C) Increases.**—The amount determined under subparagraph (A)(ii) shall be increased—

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which—

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

**(3) Qualified providers.**—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

**(4) Effective date.**—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

**(c) Death benefits coverage.—**

**(1) In general.**—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

**(2) Termination of coverage.**—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

**(d) Reserves for administration.**—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

**(e) Limitation on enrollment.**—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

**(f) Eligible beneficiary.**—For purposes of this subchapter, the term "eligible beneficiary" means an individual who—

**(1)** is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

**(2)** on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

**26 U.S.C. § 9704. Liability of assigned operators**

**(a) Annual premiums.**—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

**(1)** the health benefit premium determined under subsection (b) for such plan year, plus

**(2)** the death benefit premium determined under subsection (c) for such plan year, plus

**(3)** the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

**(b) Health benefit premium.**—For purposes of this chapter—

**(1) In general.**—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

**(2) Per beneficiary premium.**—The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

**(A)** the amount determined by dividing—

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

**(B)** the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the

calendar year in which the plan year begins exceeds such component for 1992.

**(3) Adjustments for medicare reductions.**—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

**(c) Death benefit premium.**—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

**(d) Unassigned beneficiaries premium.**—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

**(e) Premium accounts; adjustments.—**

**(1) Accounts.**—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

**(2) Allocations.—**

**(A) Administrative expenses.**—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of

expenditures (other than administrative costs) from such accounts during the preceding plan year.

**(B) Interest.**—Interest shall be allocated to the account established for health benefit premiums.

**(3) Shortfalls and surpluses.—**

**(A) In general.**—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

**(B) Exception.**—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

**(C) No authority for increased payments.**—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

**(f) Applicable percentage.**—For purposes of this section—

**(1) In general.**—The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under

section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

**(2) Annual adjustments.**—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

**(A)** Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

**(B)** The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

**(g) Payment of premiums.—**

**(1) In general.**—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

**(2) Deductibility.**—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

**(h) Information.**—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

**(i) Transition rules.—**

**(1) 1988 agreement operators.—**

**(A) 1st year costs.**—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

**(B) Deficits from merged plans.**—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

**(C) Failure.**—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

**(D) Premium reductions.—**

(i) 1st year payments.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

(ii) Deficit payments.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974

UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation.—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

**(E) Allocations of contributions and refunds.**— Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

**(2) 1st plan year.**—In the case of the plan year of the Combined Fund beginning February 1, 1993—

**(A)** the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

**(B)** the premiums under subsection (a) shall be paid as provided in subsection (g).

**(3) Startup costs.**—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

**26 U.S.C. § 9705. Transfers**

**(a) Transfer of assets from 1950 UMWA Pension Plan.—**

**(1)**

**In general.**—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

**(A)** $70,000,000 on February 1, 1993,

**(B)** $70,000,000 on October 1, 1993, and

**(C)** $70,000,000 on October 1, 1994.

**(2)**

**Reservation.**—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

**(3) Use of funds.**—Amounts transferred to the Combined Fund under paragraph (1) shall—

**(A)** in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

**(B)** in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

**(4) Tax treatment; validity of transfer.—**

**(A) No deduction.**—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable

provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

**(B) Other tax provisions.**—Any transfer pursuant to paragraph (1)—

(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

**(5) Treatment of transfer.**—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

**(b) Transfers from abandoned mine reclamation fund.—**

**(1) In general.**—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

**(2) Use of funds.**—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

**26 U.S.C. § 9706. Assignment of eligible beneficiaries**

**(a) In general.—**For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible

beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

**(1)** First, to the signatory operator which—

**(A)** was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

**(B)** was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

**(2)** Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

**(A)** was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

**(B)** was the most recent signatory operator to employ the coal industry retiree in the coal industry.

**(3)** Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

* * * *

**26 U.S.C. § 9711. Continued obligations of individual employer plans**

**(a) Coverage of current recipients.**—The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

**(b) Coverage of eligible recipients.—**

**(1) In general.**—The last signatory operator of a individual who, as of February 1, 1993, is not receiving tiree health benefits under the individual employer pl maintained by the last signatory operator pursuant to 1978 or subsequent coal wage agreement, but has met t age and service requirements for eligibility to recei benefits under such plan as of such date, shall, at such tir as such individual becomes eligible to receive benefits u der such plan, provide health benefits coverage to such i dividual and the individual's eligible beneficiaries whi is described in paragraph (2). This paragraph shall not a ply to any individual who retired from the coal industry a ter September 30, 1994, or any eligible beneficiary of su individual.

**(2) Coverage.**—Subject to the provisions of subse tion (d), health benefits coverage is described in this par graph if it is substantially the same as (and subject to a the limitations of) the coverage provided by the individu employer plan as of January 1, 1992. Such coverage sha continue for as long as the last signatory operator (and a related person) remains in business.

**(c) Joint and several liability of related persons.**—Ea related person of a last signatory operator to which subse tion (a) or (b) applies shall be jointly and severally liab with the last signatory operator for the provision of heal care coverage described in subsection (a) or (b).

**(d) Managed care and cost containment.**—The last si natory operator shall not be treated as failing to meet the r quirements of subsection (a) or (b) if benefits are provid to eligible beneficiaries under managed care and cost co tainment rules and procedures described in section 9712( or agreed to by the last signatory operator and the Unit Mine Workers of America.

**(e) Treatment of noncovered employees.**—The exi tence, level, and duration of benefits provided to form

employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

**(f) Eligible beneficiary.**—For purposes of this section, the term "eligible beneficiary" means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

**(g) Rules applicable to this part and part II.**—For purposes of this part and part II—

**(1) Successor.**—The term "last signatory operator" shall include a successor in interest of such operator.

**(2) Reassignment upon purchase.**—If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

**26 U.S.C. § 9712. Establishment and coverage of 1992 UMWA Benefit Plan**

**(a) Creation of plan.—**

**(1) In general.**—As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

**(2) Treatment of plan.**—The 1992 UMWA Benefit Plan shall be—

**(A)** a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

**(B)** an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

**(C)** a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

**(b) Coverage requirement.—**

**(1) In general.**—The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

**(2) Eligible beneficiary.**—For purposes of this section, the term "eligible beneficiary" means an individual who—

**(A)** but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

**(B)** with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

**(c) Health benefits.—**

**(1) In general.**—The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

**(2) Managed care.**—The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

**(3) Major elements of rules.**—Elements described in this paragraph are—

**(A)** implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,

**(B)** obtaining a unit price discount in exchange for patient volume and preferred provider status with

the amount of the potential discount varying by geographic region,

**(C)** limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

**(D)** utilizing, in the claims payment function "appropriateness of service" protocols under title XVIII of the Social Security Act if more stringent,

**(E)** creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

**(F)** selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

**(G)** utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

**(4) Last signatory operators.**—The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

**(5) Standards of quality.**—Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

**(A)** by the settlors, or

**(B)** by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

**(d) Guarantee of benefits.—**

**(1)** In general.—All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

**(A)** the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

**(B)** the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

**(C)** the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

**(2) Adjustments.**—The 1992 UMWA Benefit Plan shall provide for—

**(A)** annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

**(B)** adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

**(3) Additional liability.**—Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

**(4) Joint and several liability.**—A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

**(5) Deductibility.**—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

**(6) 1988 last signatory operator.**—For purposes of this section, the term "1988 last signatory operator" means a last signatory operator which is a 1988 agreement operator.

* * * *

Supreme Court, U.S.
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No. 99-262

# In the Supreme Court of the United States

ANKER ENERGY CORPORATION and
KING KNOB COAL CO., INC.,
*Petitioners*

v.

UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND, *et al.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

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## QUESTION PRESENTED

Beginning in 1974, the National Bituminous Coal Wage Agreements ("NBCWAs") explicitly referred to lifetime health coverage for retired coal miners and their dependents. The question presented in this case is whether the court of appeals correctly concluded that the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, does not violate the Due Process or Takings Clause of the Fifth Amendment as applied to Anker Energy Corporation, a coal company that, through its related person, King Knob Coal Co, Inc., voluntarily agreed to and signed the NBCWAs of 1974, 1978, 1981, and 1984.

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# BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a- 40a) is reported at 177 F.3d 161 (3d Cir. 1999). The opinions of the district court (Pet. App. 41a-50a and Pet. App. 51a-73a) are unreported.

## STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h) (the "Coal Act"), which was

enacted as Title XIX, Subtitle C, of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. The petition does not reproduce the statute in full. Among other things, it omits the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. The remainder of the statute is reproduced as an appendix to the brief in opposition filed by these respondents in *Unity Real Estate Company v. Hudson*, No. 99-12, another case in which petitioners chose to reproduce only selected portions of the statute.

## STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the specific circumstances of the petitioner in that case. The plurality and concurring opinions in *Eastern* ruled that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706(a)(3), is unconstitutional as applied to a company that left the coal business in 1965, and thus did not sign a 1974 or later National Bituminous Coal Wage Agreement ("NBCWA"), which referred expressly to lifetime health benefits for coal industry retirees and their dependents. In sharp contrast to Eastern, petitioner Anker Energy Corporation ("Anker") did not leave the coal industry in 1965, but remained in the industry and, through its related person, King Knob Coal Co., Inc. ("King Knob"), signed the NBCWAs of 1974, 1978, 1981, and 1984, each of which helped to foster an expectation of lifetime retiree health coverage. Petitioners are thus readily distinguishable from Eastern.

Contrary to petitioners' characterization, they seek not to apply *Eastern* properly, but rather to abolish the entire statutory health care system established by Congress in the Coal

Act. Through that statute, Congress sought to remedy a funding crisis in the preexisting contractual multiemployer health care plans. Recognizing the inability of collective bargaining to deal with employers that had contributed to the creation of the problem but that were no longer mining coal or participating in the collective bargaining process, Congress sought by statute to spread liability broadly among various responsible parties.

Following the decision in *Eastern*, the Commissioner of Social Security notified several dozen operators that were similarly situated to Eastern (in that none of them and none of their related persons had signed a 1974 or later NBCWA) that their Combined Fund beneficiary assignments were void in light of *Eastern*, and that no further payment would be required of them under the Coal Act. Petitioners, not fitting that description, received no such notice.

If petitioners' arguments here were accepted, coal operators that signed 1974 and later NBCWAs would no longer be required to provide health benefits to nearly 70,000 retired miners and their dependents, and the Coal Act would be totally dismantled. Petitioners' all-out assault on Congress' decision in the Coal Act to impose liability on those entities, such as Anker and King Knob, that signed collective bargaining agreements that explicitly referred to health coverage for life, benefitted from the multiemployer health care system, and then abandoned their retirees and dependents in the multiemployer funds is not supported by *Eastern* or by any decision before or after this Court's ruling.

## A. History and Structure Of The Coal Act

The several opinions in *Eastern* addressed at some length the historical background of the Coal Act.[1] We summarize only those aspects of that background that are relevant here.

### 1. *History Of The Coal Act*

#### a. *National Bituminous Coal Wage Agreements*

Since 1946, retiree health benefits in the coal industry have been provided through a series of multiemployer health plans established in collective bargaining. From 1950 through 1974, health benefits (and pension benefits as well) were provided through a single multiemployer plan known as the UMWA 1950 Welfare and Retirement Fund ("1950 W&R Fund"). Following the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et*

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[1]Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g.*, *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999), *cert. pending*, No. 99-12 (filed June 28, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) *("ABC")*; *Davon Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal, Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 786 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

*seq.* the collective bargaining parties, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), divided the 1950 W&R Fund into four separate plans. This was accomplished in the 1974 NBCWA. Pet. App. 5a. *See also Eastern*, 524 U.S. at 509 (plurality).

Two of the four new plans, the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan, provided health benefits, and the other two provided pension benefits. The 1974 NBCWA explicitly contemplated that miners and their dependents would be provided health benefits through the UMWA Plans "for life." Pet. App. 6a; *see also Eastern*, 524 U.S. at 509-10 (plurality); *Unity*, 178 F.3d at 653. The 1974 NBCWA in fact contains thirteen separate references to the retention of health services cards "for life" or "until death." *Unity*, 178 F.3d at 665. Subsequent NBCWAs, including the NBCWAs of 1978, 1981, and 1984, contain similar repeated references to the retention of health services cards "for life" or "until death" or to an "entitle[ment] to receive health benefits until death." *Id.* at 666-68.

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. First, for miners leaving covered service in the coal industry on or after January 1, 1976, the primary responsibility for retiree health coverage was shifted from the UMWA multiemployer system to the individual coal company that employed the miner in question. The 1974 Benefit Plan was retained as an "orphan" plan through which benefits would be provided to retirees whose former employer had gone out of

business. Pet. App. 6a. Second, the employers signing the 1978 and later NBCWAs agreed to the "guarantee clause" that obligated signatory employers to make contributions sufficient to maintain the contractually specified benefits throughout the term of the agreement. Third, the employers that signed the 1978 and later NBCWAs also agreed to the so-called "evergreen clause." Under the evergreen clause, all of the signatory employers agreed that they would continue to contribute to the collectively bargained plans for as long as subsequent NBCWAs required such contributions, even if a particular employer did not sign such subsequent NBCWAs. Pet. App. 6a. These contractual features were perpetuated in subsequent collective bargaining agreements, *i.e.*, the NBCWAs of 1981, 1984, and 1988.

b. *The Crisis That Threatened The Multiemployer Plans And Their Beneficiaries, And The Efforts To Resolve It*

As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by the remaining signatory operators. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. Pet. App. 6a; *see also Eastern*, 524 U.S. at 511 (plurality).

In 1989, as the situation worsened, the UMWA engaged in a ten-month labor dispute against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole

intervened and appointed a mediator. The eventual settlement provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission charged with the task of analyzing the retiree health care crisis and recommending solutions. *Eastern*, 524 U.S. at 511 (plurality).

The November 5, 1990 Coal Commission report explained that the collective bargaining process – limited as it was to companies still mining coal – was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.

### 2. *The Structure Of The Coal Act*

In the Coal Act, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. One of those funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), is at issue here.[2]

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[2]The Coal Act also created the 1992 UMWA Benefit Plan (the "1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage from their former employers. *See* 26 U.S.C. § 9712.

Under the Coal Act, the 1950 and 1974 UMWA Benefit Plans were merged into the Combined Fund as of February 1, 1993. 26 U.S.C. § 9702. The Combined Fund provides health and death benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plans. *Id.* at § 9703(a), (b)(1), (e), (f).

The coal operators that voluntarily participated in the UMWA Plans pursuant to the terms of their collective bargaining agreements with the UMWA, including petitioners, are required to finance the benefits provided by the Combined Fund. Coal Act premiums are based on the number of Combined Fund beneficiaries that have been assigned to the operators by the Secretary of Health and Human Services (now, the Commissioner of Social Security) under Section 9706 of the Act.

## B. Petitioners' Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To Anker

Petitioners seek to minimize their extensive involvement in the coal industry by claiming that they never had any obligation to make, and never made, any contribution to the UMWA Plans. Such a representation is highly misleading.

Between 1967 and 1982, King Knob contracted with Consolidation Coal Company ("Consol") to mine coal on certain property owned by Consol. As part of these contracts, King Knob agreed that all of its employees would be members of the UMWA and that it would be signatory to the then current NBCWA. Pet. App. 9a-10a. To achieve this end, King Knob, rather than joining the BCOA, elected to sign "me-too"

agreements during the 1970's and 1980's, the last in 1984.[3] Pet. App. 10a. As a result, King Knob was signatory to the 1971, 1974, 1978, 1981, and 1984 NBCWAs and was thereby obligated to contribute to the UMWA multiemployer health plans.

In 1975, an affiliate of Anker acquired King Knob. The Anker affiliate continued King Knob's relationship with Consol and with the UMWA Plans until Consol terminated the relationship in 1982. Thereafter, Anker and Consol entered into a settlement of Anker's claims arising from the termination of the relationship. As part of the settlement, Consol agreed to "reimburse King Knob for all subsequent payments due to the UMWA Fund or any successor fund attributable to" either the coal produced under the contracts between Consol and King Knob or the hours worked under those contracts." Pet. App.10a.

Anker ceased coal mining operations in November 1987 and dumped its retirees in the 1974 Plan. These Anker retirees and their dependents then received health care coverage from the 1974 Plan even though Anker was no longer contributing to the UMWA Plans.[4]

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[3]King Knob last signed a "me-too" agreement pursuant to its contract with Consol in 1981. As counsel for petitioners acknowledged at oral argument before the court of appeals, however, petitioners (or at least one of them) signed the 1984 NBCWA and contributed to the UMWA multiemployer plans until at least1987.

[4]Like the courts below, we sometimes use the term "Anker" to refer to petitioners collectively.

Under the Coal Act, the Secretary assigned liability for 244 Combined Fund beneficiaries to Anker based on Anker's status as a related person to King Knob, effective February 1, 1993, the day on which the Combined Fund began providing health coverage under the statute. Mortality has since reduced this number.

## C. Proceedings In The Courts Below

Anker and King Knob filed a complaint against the Commissioner of Social Security and the Trustees of the Combined Fund seeking a declaration that the Commissioner's assignment of beneficiaries to Anker violates the Due Process and Takings Clauses of the Fifth Amendment. Additionally, Anker sued Consol for breach of contract claiming that under the terms of their settlement agreement between Anker and Consol, Consol was liable for any premiums due the Combined Fund.

In July 1997, the district court granted Consol's motion for judgment on the pleadings on Counts I and II of Anker's Complaint, which sought to hold Consol liable under the Coal Act. In May 1998, after briefing, the court upheld the constitutionality of the Coal Act and granted summary judgment in favor of the Combined Fund, its Trustees, and the Commissioner. Finally, in July 1998, the district court granted summary judgment on the Combined Fund's counterclaim for entry of judgment against Anker for unpaid premiums, interest, liquidated damages, attorneys' fees, and costs. Anker then appealed.

The court of appeals heard argument on March 25, 1999. At that time, another case involving application of *Eastern* to post-1974 NBCWA signatories was pending before

a separate panel of the court of appeals. *See Unity Real Estate v. Hudson*, 178 F.3d 649 (3d Cir. 1999), *cert. pending* No. 99-12 (filed June 28, 1999). Briefing and argument in that case had been completed several months earlier. Four days after argument in *Anker*, the court of appeals issued its decision in *Unity*, upholding the constitutionality of the Coal Act. Among other things, the *Unity* court determined that "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." *Unity*, 178 F.3d at 659.

On April 1, 1999, the *Anker* court directed the parties to file letter memoranda discussing the effect, if any, of the Court's decision in *Unity* on *Anker*. After receiving those memoranda, the court issued its decision, following the earlier ruling in *Unity* and sustaining the constitutionality of the Act as applied to Anker.[5]

The court of appeals held that *Eastern* is distinguishable on its facts and does not support Anker's position. Relying on both the plurality and concurring opinions in *Eastern* (*see* 524 U.S. at 509, 530, 536 (plurality); 550 (Kennedy, J., concurring in the judgment and dissenting in part)), the court ruled that *Eastern* is distinguishable because, whereas Eastern did not sign a 1974 or later NBCWA, Anker, through its statutory related person, King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs. In the court's words, "analysis of the decisions in

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[5]The court of appeals also reversed the district court's decision granting Consol judgment on the pleadings and remanded the case for further proceedings.

*Eastern Enterprises* leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." Pet. App. 21a. Thus, the court held that "this case falls outside the specific holding of *Eastern Enterprises*, and . . . [that] the Coal Act's application to Anker [is] constitutional." Pet. App. 22a.

With respect to the merits of Anker's constitutional claims, the court ruled that it, like the courts of appeals in *Unity* and *ABC*, was "bound to follow the five-four vote against the takings claim . . . ." Pet. App. 37a-38a. Thus, the court devoted the bulk of its discussion to Anker's argument that the Coal Act, as applied to it, is impermissibly retroactive under the so-called substantive component of the Due Process Clause. Pet. App. 22a-25a.

The court began its review of Anker's claims by reiterating its holding in *Unity* that "the proper standard of review for a due process analysis is whether Congress's action was arbitrary or irrational." Pet. App. 22a. Quoting the opinion in *Unity* (178 F.3d at 671), the court stated that "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 23a. The court also relied on its conclusion in *Unity* that "Congress's determination that the coal industry acted in a way that created the miners' reasonable expectation of lifetime benefits, and . . . its finding that the coal companies were the most responsible parties for the deterioration of the Benefit Plans were 'reasonable evaluations of the problem.'" *Id.* at 22a. Finding that Anker bears the same responsibility as Unity "for creating the reasonable expectations

and the problem of under-funding that the Coal Act redresses" (Pet. App. 24a), the court of appeals ruled that the statute does not violate due process principles as applied to Anker.

## ARGUMENT

The court of appeals decision is correct and further review is not warranted. The decision is fully consistent with this Court's ruling in *Eastern* and accurately reflects the limited nature of that ruling. The court applied the well-established legal standard governing substantive due process challenges to economic legislation, and it did so with proper regard for the retroactive aspect of the statute at issue.

In sustaining the validity of the Coal Act as applied to post-1974 NBCWA signatories, the court of appeals reached the same result as the D.C. Circuit, the first post-*Eastern* court to address the constitutionality of the statute as applied to such employers. *ABC*, 156 F.3d at 1253-58. *See also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) ("the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory"); *Holland v. Robert Coal*, 172 F.3d 919, 1998 WL 794832 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1803 (1999). There is no conflict among the circuits.

If Anker's argument were accepted, the entire congressional scheme for protecting retiree health benefits in

the coal industry would be defeated.[6] *Every* signatory employer (including signatories to the 1988 NBCWA, the collective bargaining agreement in effect when the Coal Act was passed) could make the same argument as Anker, namely, that the contribution obligations to which it agreed by contract were limited to the terms of the contracts they signed and that therefore Congress' effort to impose a new statutory obligation covering the period *after* the term of those agreements is invalid. As the court of appeals correctly recognized, such an outcome would be irreconcilable not only with several decisions upholding the Coal Act after *Eastern* but also with the reasoning of the plurality and the concurrence in *Eastern* itself and with this Court's own precedents establishing that the legislative authority of Congress is not confined by the terms of private contracts. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-07 (1935).

## A. The Court of Appeals' Decision Does Not Conflict With *Eastern*

Anker's argument that the court of appeals improperly refused to follow *Eastern* is incorrect. First, the "retroactivity analysis" that Anker attempts to derive from the plurality and concurring opinions in *Eastern* does not represent the holding of the Court and does not have some independent constitutional status apart from the two separate Fifth Amendment provisions on which the Members of the Court who voted in favor of *Eastern* relied. Second, Anker which, through its related

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[6]Anker itself acknowledges that the vast majority of companies subject to the Coal Act are post-1974 NBCWA signatories. Pet. 21.

person, King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs, is not similarly situated to Eastern, which left the coal industry in 1965 and did not sign an NBCWA after 1964. Third, Anker's argument that it never had a contractual obligation to make payments to the UMWA multiemployer health care system is simply untrue. Fourth, the court of appeals properly rejected Anker's claims of unconstitutional "retroactivity."

### 1. *Anker Misstates The Holding Of Eastern*

Anker contends that the plurality and Justice Kennedy relied "upon similar reasoning" in assessing the constitutionality of the Coal Act. Pet. 10. Specifically, it claims that those five Justices agreed that "retroactive employee benefits legislation is unconstitutional if it imposes a substantial economic burden on employers which is based on conduct 'far in the past' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" *Id.* at 17. Applying this alleged "similar reasoning" to itself, Anker concludes that the Coal Act is unconstitutional as applied to it. *Id.* This reasoning is faulty for several reasons.

To begin with, contrary to Anker's claims, the plurality and the concurrence reached their respective opinions based on very different constitutional reasoning. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to Eastern. 524 U.S. at 529 (plurality). Justice Kennedy affirmatively rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part). The

plurality declined to reach the due process question and acknowledged that the Court "has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* at 537 (plurality).

Anker ignores the disagreement between the plurality and concurring opinions and declares that the plurality and Justice Kennedy employed "a virtually identical retroactivity analysis." Pet. 18. Anker further avoids any argument addressed to either the Takings Clause or the Due Process Clause and amalgamates the two distinct concepts by asserting that its "analysis" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. *Id.*

But this is not the way courts determine the constitutionality of statutes. The "retroactivity analysis" that Anker purports to extract from the plurality and concurring opinions in *Eastern* has no independent constitutional status; there is no right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. For this very reason, the D.C. Circuit in *ABC* rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "analysis":

> We begin our analysis with a bedrock principle of constitutional adjudication. . . . The Constitution prohibits certain governmental action through specific clauses. . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. .

> . . We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

*ABC*, 156 F.3d at 1253-54.

By failing to demonstrate – or even to argue – that the Coal Act violates their rights under either the Due Process Clause or the Takings Clause, Anker attempts to elevate its purported "retroactivity analysis" to constitutional status and to obscure the "bedrock principle" that laws are unconstitutional only if they violate a specific clause of the Constitution. Anker's peculiar approach has been properly rejected by both courts of appeals that have decided post-*Eastern* challenges to the Coal Act, and it does not warrant review here.

### 2. *Anker Is Not Similarly Situated to Eastern*

Even if Anker had properly presented claims under the Due Process Clause or the Takings Clause rather than its generalized claim of "unconstitutionality," *Eastern* would not support Anker's position. The lynchpin of the plurality and concurring opinions in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. 514-16 (plurality), 550 (Kennedy, J., concurring in the judgment and dissenting in part). Anker, by contrast, actively mined coal until at least 1984, and signed the 1974, 1978, 1981, and 1984 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example, that "[t]he 1974

NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 524 U.S. 509. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

*Id.* at 530 (emphasis added); *see also id.* at 536 ("There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's*") (emphasis added).

Justice Kennedy likewise concluded that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

*Id.* at 550 (emphasis added). The four dissenting Justices in

*Eastern* took the view that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 553 (Stevens, J., dissenting) ("their implicit agreement was made explicit in 1974").

The common theme among the various opinions in *Eastern* is that the 1974, 1978, and subsequent NBCWAs created in retired coal miners a reasonable expectation of lifetime health benefits. As stated by the D.C. Circuit in *ABC*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d at 1257. Thus, Anker which, through King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs and thereby helped to foster an expectation of lifetime health coverage, cannot avoid its Coal Act liabilities by claiming that it is similarly situated to Eastern.

### 3. *Anker's Argument Is Based On A False Premise; It Was Always Responsible For The Health Care Benefits of Its Retirees And Congress' Legislative Authority Is Not Limited By Contractually Binding Promises*

Anker argues that it was never responsible for the payment of premiums or royalties to any of the UMWA Plans and that, in any event, the term of the obligation was limited to the duration of the contract. Pet. 19. For these reasons, Anker claims that the retroactive Coal Act liabilities imposed on it are "completely unrelated to any past conduct and is not related to

any commitment [it has] ever made." *Id.* This argument is fundamentally flawed for two reasons.

First, Anker's argument that it is like Eastern because it too was not obligated to make any contributions to the UMWA Benefit Funds is simply untrue. The NBCWAs King Knob signed throughout the 1970's and 1980's contained provisions requiring contributions to the 1950 and 1974 Benefit Plans. That King Knob had a separate agreement with Consol under which Consol agreed to make the required contributions to the UMWA Benefit Plans did not relieve King Knob of its underlying obligation to these Plans under its contracts with the UMWA. Indeed, it was King Knob, and not Consol, that employed the miners in question. Thus, unlike Eastern, Anker, through its related person, King Knob, agreed to be bound to the 1974, 1978, 1981, and 1984 NBCWAs (all of which included provisions referring explicitly to lifetime health benefits), employed miners who worked under these agreements, and agreed to contribute to the UMWA Benefit Plans on behalf of these employees.[7] As the appellate court emphasized, "King Knob's ability to have Consol assume this obligation is simply irrelevant to the fact that by agreeing to the NBCWAs King Knob was a party to the agreements that created the miners' expectation of lifetime benefits." Pet. App. 24a. Consequently, even in the view of the five Justices who

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[7]Anker's argument is particularly disingenuous in light of the fact that even after its relationship with Consol terminated in 1982, it, and or King Knob, signed the 1984 NBCWA and contributed to the UMWA Plans until at least 1987.

voted in favor of Eastern, Anker, through King Knob,[8] contributed to the miners' expectation of lifetime benefits. *Eastern*, 524 U.S. at 535 (plurality opinion)("Not until 1974 . . . could lifetime medical benefits under the multiemployer agreement have been viewed as promised."); id. at 550 (Kennedy, J., concurring in the judgment and dissenting in part)("As the plurality opinion discusses in detail, the expectation [of lifetime benefits] was created by promises and agreements made long after Eastern left the coal business.").[9]

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[8]Anker does not contest that it is a "related person" to King Knob under Section 9701(c)(2) of the Coal Act. Pet. App. 28a.

[9]The court of appeals also properly rejected Anker's argument that it is like Eastern because it was never a member of the BCOA and it did not participate directly in the NBCWA negotiations. Indeed, the court held that "[t]he difference between a member of the BCOA and a 'me-too' signatory to a NBCWA is of no consequence to this case despite Anker's contrary assertions." Pet. App. 38a (*citing Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992)("'Me-too' agreements have terms identical to the terms of the national agreement, and thus there is no distinction among them concerning employers' contractual rights and obligations."); *Arizona Laborers, Teamsters and Cement Masons Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir. 1985)(defining a "me-too" agreement as an agreement by which a smaller employer can obtain all of the benefits of the master collective bargaining agreement without joining the industry association and incurring the costs of participating in industry negotiations or negotiating independently with the union). The court further stated that while the court of appeals in *Unity*

Second, Congress, in exercising its legislative power, is not fettered by the terms of private contracts. *See Connolly*, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of Congress") (*quoting Norman*, 294 U.S. at 307-08). Indeed, if there were a requirement that legislation merely track contractual promises, there would be little impetus to enact legislation. As the court of appeals in *Unity* recognized, "[t]he *Eastern* plurality did not reject the *Connolly* principle that government may do more than require private parties to live up to their contracts." 178 F.3d at 672.

The rationality of Congress' decision to provide for the stable financing of health care benefits for coal industry retirees does not depend on a finding of a contractually binding "promise" or "commitment," however those words may be defined. The legislative purpose is a legitimate governmental objective that Congress is authorized to pursue in the exercise of its Article I powers. Thus, the only question is whether Congress has acted rationally and non-arbitrarily in imposing liability on the very employers that created, participated in, and benefitted from the UMWA multiemployer health care system, that signed collective bargaining agreements that explicitly referred to health coverage for life, and that formerly employed retirees who were continuing to receive benefits from the multiemployer system at the time that Congress acted. As summarized by the court of appeals in *Unity*, "we think that

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referred to the employers' membership in BCOA, it would "not read this language to allow 'me-too' signatories to avoid the application of the Act." Pet. App. 24a.

explicit promises are not necessary in order to justify congressional action. The question is what reasonable expectations the coal companies' actions created." 178 F.3d at 664.

The NBCWAs signed by Anker in 1974, 1978, 1981, and 1984 referred repeatedly to health care coverage "for life" or "until death," even though the funding mechanism was tied to the term of each successive NBCWA. Like the court in *Unity*, the court of appeals here found that Anker, as a signatory to the 1978 and subsequent NBCWAs, bears responsibility "for creating the reasonable expectations and the problem of underfunding that the Coal Act redresses." Pet. App. 24a. Anker, argues, however, that each NBCWA it signed was limited to the term of that specific contract and that every NBCWA it signed had long since expired before enactment of the Coal Act. Pet. 19. As the *Unity* court correctly ruled, however, this argument goes "to the contract and not to the reasonable expectations that might have been created by the contract." *Id.* at 664. This conclusion is entirely consistent with the view expressed by all members of the Court in *Eastern* that the 1974 and subsequent NBCWAs expressly referred to the provision of lifetime health benefits. 524 U.S. at 509, 530, 536 (plurality), 550 (Kennedy, J., concurring in the judgment and dissenting in part), 553 (Stevens, J., dissenting).

### 4. *The Court Of Appeals Properly Rejected Anker's Claims of Unconstitutional "Retroactivity"*

Anker contends that, as applied to it, the Coal Act is impermissibly retroactive. This argument is defective in several respects.

First, although the point is undisputed, Anker nowhere acknowledges that the Coal Act provides benefits purely on a prospective basis and does not require funding for *any* health care received before the statute's enactment. To the extent the statue is retrospective at all, it is retrospective only in the sense that other federal statues, such as the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, are also retrospective. In establishing the existence and extent of current and future liabilities, those laws look in part to events that occurred in the past. But, as the decisions sustaining the Black Lung Benefits Act and CERCLA show, *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), that fact alone is insufficient to establish that such laws are invalid, even where the coal industry employment or polluting discharge in question occurred *decades* before the statutes' enactment.

Second, Anker exaggerates the extent of the Coal Act's "retroactivity." By focusing on the beginning rather than the end of the terms of the last coal industry collective bargaining agreements that they signed, petitioners assert that the Coal Act involves eight (rather than four) years of retroactivity. On this dubious reasoning, the statute would involve nearly five years of retroactivity even with respect to those operators that were NBCWA signatories at the time the Coal Act was passed. That is so because the then-current NBCWA was the 1988 NBCWA, the term of which began on February 1, 1988, well over four and a half years before the statute's enactment. This point

confirms that, unlike this Court's decision in *Eastern*, Anker seeks to destroy the entire Coal Act.

In any event, even using Anker's questionable arithmetic, the retroactivity of the Coal Act as applied to Anker does not remotely approach the degree of retroactivity that five Justices found offensive in *Eastern*. According to the plurality and concurring opinions, the employer in that case left the coal industry in 1965, more than 27 years before the Coal Act was passed. The court of appeals found the length of time since King Knob last agreed to an NBCWA was eight years, and that because the Third Circuit had found 11 years to be acceptable in *Unity*, the degree of retroactivity was not impermissible.

Perhaps most important, Anker's simplistic counting of years neglects altogether the close relationship among the liability imposed by the Coal Act, the collective bargaining agreements signed by Anker (with their frequent references to lifetime health care), Anker's own conduct in "dumping" its retirees into the contractual multiemployer plans (where for years they received benefits paid for entirely by other employers), and the legitimate governmental interests supporting the challenged legislation. In the *Unity* court's words, "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." 178 F.3d at 671.

### B. The Court of Appeals Correctly Interpreted *Marks v. United States*, And Anker's Other Proposed Grounds For Review Are Insubstantial

Anker claims that the court of appeals' determination that *Eastern* is indistinguishable from this case raises an important and recurring issue about the way in which lower

federal courts should interpret and apply plurality decisions of this Court. Anker's critique of the court of appeals' application of this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), is unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another – only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Rappa*, 18 F.3d at 1058; *see also King*, 950 F.2d at 782.

The court of appeals here correctly observed that "Justice Kennedy's substantive due process reasoning is not a 'narrower' ground that we might take to constitute the controlling holding." Pet. App. 17a (*quoting Unity*, 178 F.3d at 658). In such circumstances, "the only binding aspect of a splintered decision is its specific result . . . . " Pet. App. 17a. This conclusion is entirely consistent with the plurality and concurring opinions in *Eastern*. *See* 524 U.S. at 536-37 (plurality); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

In an attempt to avoid the plain holding of *Marks*, Anker claims that five Justices agree about the controlling legal principles, even though they disagree about what clause of the

Constitution controls. Pet. 22. This analysis cannot stand. As explained by the court of appeals in *Unity*,

> *There is fundamental conceptual difference between a takings claim and a substantive due process claims.* If the government pays just compensation, it may take property for public use under the Taking Clause. Due process protections, by contrast, define what the government may not require of a private party at all. It is the difference between a liability rule and a property rule.

*Unity*, 178 F.3d at 658 (emphasis added).

Contrary to Anker's claims, certiorari is not warranted so that the Court can "clarify *Eastern*" and "provide guidance to the federal courts concerning the proper legal precepts to apply in adjudging retroactive legislation." Pet. 24. The Court already grappled with these issues in *Eastern* and there is no basis for the Court to address them again now. Moreover, the principles espoused in *Marks* and cases interpreting it provide a proper framework for the interpretation of plurality decisions of this Court. There is no need for further doctrinal clarification.

Anker is also wrong in its characterization of the court of appeals' reference to the fact that five Justices in *Eastern* concluded that the Coal Act should not be reviewed under the Takings Clause. The court of appeals simply observed that only four Justices in *Eastern* accepted the plurality's takings analysis. Since that view did not command a majority in this Court, it does not bind lower federal courts. This unremarkable

conclusion does not conflict with *King*, 950 F.2d 771, and provides no basis for further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-262

# In the Supreme Court of the United States

ANKER ENERGY CORPORATION, ET AL., PETITIONERS

*v.*

UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE COMMISSIONER OF SOCIAL SECURITY IN OPPOSITION

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## QUESTION PRESENTED

Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised the miners health-care benefits for life violate the Due Process or Just Compensation Clause of the Fifth Amendment.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE COMMISSIONER OF SOCIAL SECURITY IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 177 F.3d 161. The opinions of the district court (Pet. App. 41a-50a, 51a-73a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 505-509 (1998) (plurality opinion). The NBCWAs covered members of the BCOA that employed miners, as well as other coal mine operators who, although not members of the BCOA, nonetheless agreed to be bound by the terms of the NBCWAs in "me too agreements." See Pet. App. 10a.

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for UMWA miners, retirees, and their dependents. See *Eastern*, 524 U.S. at 505-506 (plurality opinion). In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and miners who retired in 1976 or thereafter. *Id.* at 509 (plurality

opinion). Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Id.* at 510 (plurality opinion); see also Pet. App. 6a; *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers that were bound by the NBCWA agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained to provide health-care benefits to post-1975 "orphaned" retirees, whose last employer had gone out of business. See *Eastern*, 524 U.S. at 510 (plurality opinion). The 1950 Benefit Trust for miners who retired before 1976 (and their dependents) was also retained. See *id.* at 511 (plurality opinion). The 1978 NBCWA, like the previous one, expressly promised that miners covered by the agreement would receive health-care benefits for life. See *Chateaugay*, 53 F.3d at 482.

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the phenomenon of coal operators "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased

contributing to the Trusts. Those rising costs, in turn, influenced some still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the trust fund contribution base. See *Eastern*, 524 U.S. at 511 (plurality opinion). The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.* (plurality opinion).

2. In 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to examine the financial crisis confronting the Trusts and to recommend solutions. See *Eastern*, 524 U.S. at 511-512 (plurality opinion). As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 512-513 (plurality opinion). The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *id.* at 513-514 (plurality opinion); 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act created two new, private multi-employer health-care benefit trusts. The first new fund, the United Mine Workers of America Combined Fund (Combined Fund), the trust at issue in *Eastern*, was created by the statutory merger of the 1950 and 1974 Benefit Trusts.

It provides benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those Trusts as of July 1992. See 26 U.S.C. 9702.[1]

The Coal Act provides that health-care benefits from the Combined Fund shall be financed through annual premiums paid by "signatory operators." The Act defines a "signatory operator" to be a person "which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The term "coal wage agreement" includes both the NBCWAs and the "me too agreements." See 26 U.S.C. 9701(b)(1). Any "related person" to a signatory operator is jointly and severally liable for the signatory operator's premiums. See 26 U.S.C. 9701(c)(2)(A), 9704(a).

The amount of the premiums is determined by the Commissioner of Social Security under a three-tier formula established by the Coal Act. 26 U.S.C. 9706(a). Under that formula, the Commissioner is to assign responsibility for the benefits of a retired miner, if possible, to a signatory operator that "employ[ed]" the retiree in the coal industry under a 1978 or subsequent wage agreement (or any related person to such a signatory operator). See 26 U.S.C. 9706(a)(1)(B) and (2)(B).

The Coal Act directs the creation of the Combined Fund as a private multi-employer benefit plan, and the appointment of its trustees. 26 U.S.C. 9702(a). The Act further provides that the Combined Fund shall have the same legal status as any other private multi-employer welfare benefit plan under the Labor Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974. 26 U.S.C.

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[1] The Coal Act also established another fund, the 1992 UMWA Benefit Plan, which is not at issue here. See 26 U.S.C. 9712.

9702(a)(3); see 29 U.S.C. 186(c)(5); 29 U.S.C. 1002(1) and (37).

3. From 1967 until 1982, petitioner King Knob Coal Co. and Consolidation Coal Company[2] were parties to a series of contracts under which King Knob agreed to extract coal on properties owned or controlled by Consolidation. Pet. App. 9a. In those contracts, King Knob agreed that "all parties working for it in connection with the undertaking covered by this Agreement shall be its [King Knob's] employees." *Id.* at 28a. King Knob also agreed that "its employees shall be members of the United Mine Workers of America and it shall be a signatory to the then current [NBCWA]." *Id.* at 9a-10a. King Knob signed "me too" agreements during the 1970s and early 1980s; the last collective bargaining agreement executed by King Knob was a "me too" agreement in 1984. *Id.* at 10a.

During the course of the contractual relationship between King Knob and Consolidation, King Knob was acquired by an affiliate of petitioner Anker Energy Corporation in 1975. Pet. App. 10a. Thereafter, in 1982, the contract mining agreements between Consolidation and King Knob were terminated, and a settlement agreement between Consolidation and King Knob provided that Consolidation would reimburse King Knob for certain subsequent payments "due to the

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[2] Consolidation Coal Company was a defendant in the district court and appellee in the court of appeals. Although the decision of the court of appeals was in part adverse to Consolidation (see Pet. App. 33a-34a), Consolidation has not filed a petition for a writ of certiorari seeking review of any part of the court of appeals' decision. Petitioners have informed the Court that Consolidation does not intend to participate in the proceedings in this Court. See Pet. ii.

UMWA Fund or any successor fund" to finance miners' health-care benefits. *Ibid.*

In 1994 and 1995, the Commissioner of Social Security notified petitioner Anker Energy Corporation that it had been assigned liability for a number of beneficiaries under the Coal Act as a "related person" to King Knob. Pet. App. 10a. Anker objected to those assignments on the ground that they should have been made to Consolidation because Consolidation owned the mine where King Knob's employees worked, had made payments to the Benefit Trusts to cover the health-care expenses of King Knob's employees, and had agreed in the 1982 settlement agreement to assume continued financial liability for the health-care expenses of those employees. The Commissioner rejected those objections, emphasizing that the retired miners in question were employed by King Knob:

> Under the Coal Act, ownership of a mine is immaterial to assignment decisions. Assignments are made solely on the basis of the signatory employer who employed the eligible retiree. In the case involving King Knob, an affiliate of Anker Energy, the signatory that employed the retirees was King Knob, not Consol[idation]. Also, for Coal Act purposes, SSA is not bound by any private agreements made between companies, nor does the Coal Act allow for pro-ration of premium payments between companies. In light of the foregoing, no assignments that were made to Anker on the basis of its relationship to King Knob Coal can be reassigned to Consol[idation].

*Id.* at 26a (citation omitted).

4. Petitioners initiated this action in district court against the Commissioner, the Combined Fund, and

Consolidation to contest Anker's liability for the beneficiaries assigned to it as a related person to King Knob. Petitioners contended that the assignments should have been made to Consolidation, that Consolidation was contractually obligated to reimburse them for any liability to the Combined Fund, and that the assignment of beneficiaries to Anker violated the Due Process and Just Compensation Clauses of the Fifth Amendment. Pet. App. 11a.

In July 1997, the district court granted Consolidation judgment on the pleadings, dismissing petitioners' claim that the assignments should have been made to Consolidation, Pet. App. 67a, as well as their claim that Consolidation was required to reimburse Anker for payments to the Combined Fund, *id.* at 68a. In March 1998, before this Court decided *Eastern*, the district court rejected petitioners' constitutional challenges, and granted summary judgment for respondents. *Id.* at 45a. In July 1998, the court entered judgment for respondents Combined Fund and its Trustees on their counterclaims seeking premiums, interest, liquidated damages, attorney's fees, and costs. *Id.* at 13a.

5. While this case was still before the district court, a divided Court held in *Eastern Enterprises* v. *Apfel* that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See 524 U.S. at 516-517 (plurality opinion) (recounting history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners or their dependents who had worked for the company before 1966. *Id.* at 517 (plurality opinion). Eastern contended that the Coal Act violated substantive due process as

applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense.

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See *Eastern*, 524 U.S. at 524-527. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 523-524), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 532 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *ibid.* (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 537 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see *Eastern*, 524 U.S. at 539-547, but concluded that the application of the Coal Act to Eastern violated "[a]ccepted principles" of substantive due process in-

hibiting the operation of severely retroactive laws, *id.* at 547- 550. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 549. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, * * * it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and agreements made long after Eastern left the coal business." *Id.* at 550.

Four Justices dissented, concluding that the Coal Act, as applied to Eastern, was not unconstitutional under either due process or taking principles. *Eastern*, 524 U.S. at 553-568. The four dissenting Justices agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 554-557.

6. After this Court's decision in *Eastern*, the court of appeals affirmed the judgment of the district court in part and reversed in part. Pet. App. 1a-40a. The court held that the Coal Act is constitutional as applied to petitioners. *Id.* at 25a. In reaching that decision, the court followed in large part its analysis in *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649 (3d Cir. 1999), petition for cert. pending, No. 99-12, in which the same constitutional claims were rejected. See Pet. App. 9a, 17a, 22a-25a.

First, the court observed that the concurrence in *Eastern* did not rest on a "narrower" ground of decision than that of the plurality opinion, and so neither de-

cision could be taken as constituting the "controlling holding" of *Eastern*. Pet. App. 17a. Therefore, the court concluded, *Eastern* requires "a finding that the Coal Act is unconstitutional as applied to [petitioners] * * * only if [petitioners] stand[] in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Ibid.* (internal quotation marks omitted).

The court then noted that *Eastern* involved a mine operator that had not signed either the 1974 or a subsequent NBCWA, whereas King Knob, the signatory operator in this case, had agreed to be bound by NBCWAs in 1974 and afterwards. Pet. App. 17a. "[The] plurality and concurrence [in *Eastern*] both found significant the fact that Eastern Enterprises was not a signatory to either the 1974 or 1978 NBCWAs, and thus it did not contemplate either being responsible for or contributing to the miners' expectation of lifetime benefits." *Ibid.* In light of both the taking analysis applied by the plurality in *Eastern* and the due process analysis undertaken by Justice Kennedy in that case, the court concluded, "a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." *Id.* at 21a. Following its earlier decision in *Unity* as well as the D.C. Circuit's decision in *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246 (1998), the court then held the Coal Act's application to Anker constitutional. Pet. App. 21a-22a.

The court also explained that its opinion in *Unity* directed it "to apply an additional level of due process analysis designed to measure the extent of the gap

between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." Pet. App. 22a (internal quotation marks omitted). Under that analysis, the court concluded that the duration of the Coal Act's retroactive operation does not render its application to Anker violative of due process. *Id.* at 23a. The court observed that the extent of the retroactive application of the Act in this case is no greater than it was in *Unity* (there, 11 years). *Ibid.* Further, Anker's liability under the Coal Act is proportional to the experience of King Knob (its related party) with the earlier system of financing coal miners' benefits, because King Knob was a signatory to the 1978 and subsequent NBCWAs and therefore bears some of the responsibility for creating miners' reasonable expectation of lifetime health-care benefits as well as the problems of underfunding that the Coal Act redresses. *Id.* at 24a- 25a. Concluding finally that "nothing germane to our holding in [*Unity*] distinguishes Anker from the plaintiffs in [*Unity*]," the court held the Act constitutional as applied to petitioners "because of the factual distinction that makes *Eastern Enterprises* inapplicable, and because the case falls squarely under [the] analysis and holding in [*Unity*]." *Id.* at 25a.[3]

The court reversed, however, the district court's decision to dismiss Consolidation as a defendant to petitioners' suit, and remanded for further proceedings on petitioners' claims against Consolidation. Pet. App. 29a-35a. The court concluded that the district court had erred in ruling on the pleadings that the settlement

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[3] The court also affirmed the district court's decisions upholding the assignment of beneficiaries to Anker, Pet. App. 25a-29a, and the award of interest, liquidated damages, attorney's fees, and costs to the Combined Fund, *id.* at 35a-36a.

agreement between King Knob and Consolidation could not have obligated Consolidation to reimburse petitioners for their financial liability to the Combined Fund. *Id.* at 31a-32a. The court also rejected the district court's conclusion that the Coal Act voided private contractual arrangements for indemnification or reimbursement of liability for health-care benefits entered into before the Act was passed. *Id.* at 32a-34a. The court ruled that, while the Coal Act does assign initial responsibility for Coal Act premiums to the "signatory operators," as defined by the Act, it does not prohibit private contractual agreements whereby those signatory operators may seek recompense for those premiums from other entities. *Id.* at 34a-35a.

**ARGUMENT**

1. Petitioners contend (Pet. 17-21) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and those employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals' decision conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator that challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator before the Court in *Eastern*. Unlike that operator, petitioner King Knob (for whom petitioner Anker is also responsible as a related party) signed collective bargaining agreements in 1974, 1978, and 1981, that promised its employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern*.

The decision of the court of appeals in this case, following its similar decision in *Unity Real Estate* v. *Hudson*, 178 F.3d 649 (3d Cir. 1999), petition for cert. pending, No. 99-12, is also correct under well-settled taking and substantive due process principles, and it does not conflict with any decision of any other court of appeals. To the contrary, the only other court of appeals that has considered a constitutional challenge to the Coal Act since *Eastern* by companies that were bound by the 1974 and 1978 NBCWAs has rejected that challenge, see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998), based on a reading of the plurality and concurring opinions in *Eastern* that largely parallels that of the Third Circuit in this case and in *Unity*. Further, this Court recently denied review in another case from the District of Columbia Circuit presenting the same challenges to the Coal Act. See *Holland* v. *Robert Coal Co.*, 172 F.3d 919 (D.C. Cir. 1998) (Table), cert. denied, 119 S. Ct. 1803 (1999). There is no basis in this case for a different result. Further review is therefore not warranted.

a. Although the Court in *Eastern* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See 524 U.S. at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (opinion of Kennedy, J.). This case, by contrast, presents a factual situation in which the signatory operator agreed to be bound by NBCWAs promising its employees lifetime benefits. Thus, as the court of appeals concluded, "the fact that [King Knob] was a signatory to 'me too'

agreements from the 1970s until 1984 distinguishes [petitioners'] situation from that of Eastern Enterprises." Pet. App. 21a. The result reached by the Court in *Eastern* therefore does not govern here. To the contrary, as the court of appeals observed in *Unity*, "[b]ecause [petitioners] signed NBCWAs in 1974 and thereafter, they are factually distinguishable from [*Eastern*]. Language in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports [that] conclusion." *Unity*, 178 F.3d at 659; see also *Association of Bituminous Contractors*, 156 F.3d at 1257 ("the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability.").[4]

b. Petitioners' further contention (Pet. 17-20) that the court of appeals failed to apply the "retroactivity analysis" supposedly endorsed by five Justices in *Eastern* is without merit. Petitioners submit (Pet. 17) that that analysis requires that "retroactive employee benefits legislation is unconstitutional if it imposes a substantial economic burden on employers which is based on conduct 'far in the past' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" Contrary to petitioners' contention, the court of appeals, following its retroactivity analysis in *Unity*, see Pet. App. 22a- 23a, correctly

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[4] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Coal Act requires petitioners to finance the health benefits of retirees who were covered by King Knob until 1984. See p. 6, *supra*; cf. *Eastern*, 524 U.S. at 516 (plurality opinion).

concluded that the retroactive scope of the Act, as applied to petitioners, is not beyond Congress's legislative power. *Id.* at 23a.

Thus, the court of appeals, following *Unity* and this Court's decisions in *Eastern* and in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), properly examined the proportionality of the burden imposed by the Coal Act on petitioners and sustained that burden as permissible. Pet. App. 24a. As the court of appeals noted here, in *Unity* the court "found that the Coal Act imposes a burden justified by both the industry's conduct that created reasonable expectations of lifetime benefits * * * and conduct that created the problem of underfunding." *Id.* at 23a. The court then ruled that the "proportionality analysis in [*Unity*] applies full force here because King Knob was a signatory to the 1978 and subsequent NBCWAs, and thus bears the same responsibility as the plaintiffs in [*Unity*] for creating the reasonable expectations and the problem of under-funding that the Coal Act redresses." *Id.* at 24a. The imposition of liability on petitioners, therefore, can hardly be considered "not related to any commitment they have ever made" (Pet. 19).[5]

The court of appeals also correctly concluded that the extent of retroactivity present in this case is not so

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[5] Nor is it relevant, as petitioners contend (Pet. 19), that Consolidation, rather than King Knob, was responsible for making payments to the Benefit Trusts to finance miners' health-care benefits. The crucial point is that King Knob agreed to be bound by the 1974 and later NBCWAs, including their express promises of lifetime benefits, and therefore participated in the creation of the miners' reasonable expectation of such benefits. Even if Consolidation was the party responsible for directly paying the Trusts for the miners' benefits, that cost was presumably reflected in the contract price negotiated between King Knob and Consolidation.

extreme as to contravene substantive due process. Pet. App. 24a. The court observed that, in *Unity*, the court had found 11 years' retroactive operation to be "acceptable." *Ibid.* Similarly, the court properly found the extent of retroactivity here to be acceptable; the Coal Act took effect only 11 years after King Knob agreed to be bound by an NBCWA in a contract with Consolidation and only eight years after King Knob signed a "me too" agreement. *Ibid.* As the court of appeals noted in *Unity*, this Court has held that "Congress may retroactively bar employers from giving their employees vested pensions in multiemployer plans and then leaving those plans to collapse." *Unity*, 178 F.3d at 671. Furthermore, in contrast to Eastern, petitioners here participated in the creation of a reasonable expectation of lifetime benefits and left the benefit plans in a condition vulnerable to collapse. Accordingly, the periods of retroactivity applicable to the conduct of petitioners survive constitutional scrutiny.

Finally, in *Unity*, the court of appeals properly found that the Coal Act was an appropriate congressional response to commitments participated in by petitioners, and was designed to remedy injuries caused by companies that withdrew from the coal industry, leaving "orphaned" miners and their dependents without provision for adequate funding to meet the expectation of lifetime benefits. 178 F.3d at 674. That particular point was not expressly addressed in the decision below in this case, but in any event petitioners' attempt to rely on *Eastern* to counter that conclusion (Pet. 19) is misplaced. The injuries that the Coal Act is intended to remedy are not physical harms suffered in "employment in mines," *ibid.*; rather, as the court of appeals observed in *Unity*, they are the harms caused by "dumping" retirees on benefit Funds whose funding

structures were vulnerable to such behavior. 178 F.3d at 674.

2. Petitioners contend (Pet. 21-23) that the court of appeals incorrectly applied *Marks* v. *United States*, 430 U.S. 188 (1977), by failing to give "import to the points of agreement between the *Eastern* plurality and the concurrence." Pet. 22. That contention is without merit.

*Marks* addresses the situation where a concurring opinion in this Court reaches the same result as that reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion, because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. 430 U.S. at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal industry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. As we have explained, both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 8-10, *supra*. The court of appeals properly focused on that point of agreement between the plurality and Justice Kennedy in *Eastern* to reject petitioners' due process claim.

Petitioners also err in arguing (Pet. 23) that the court of appeals improperly "created a majority out of the concurrence and dissent and, thus, established as the law of the case the position taken by the *Eastern* dissent" to reject their taking claim. That argument overlooks the reliance of both the plurality in *Eastern* and the court of appeals in *Unity* (and consequently in this case as well, where the court followed its earlier decision in *Unity*) on *Connolly*, including the three-part taking analysis of *Connolly*, in evaluating the constitutionality of the Coal Act as applied to petitioners. See *Eastern*, 524 U.S. at 529-532 (plurality opinion); *Unity*, 178 F.3d at 657-658, 661, 663-665, 671-673, 677. Moreover, although in *Unity* the court of appeals analyzed this case principally under the rubric of substantive due process, it observed that "[t]o the extent that *Eastern* embodies principles capable of broader application, * * * due process analysis encompasses the relevant concerns." *Id.* at 659.

Thus, rather than giving legal effect to the agreement between the concurrence and the dissent, as petitioners contend (Pet. 22), the court of appeals effectively applied the analytical scheme of the plurality in *Eastern* to the facts of this case. For the reasons given above, petitioners' claims fail even under the reasoning of the plurality opinion in *Eastern*, which emphasized that Eastern—unlike petitioners herein and other coal companies that signed the 1974 and later NBCWAs—never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. The plurality opinion and Justice Kennedy's concurrence therefore form a majority sufficient to reject petitioners' taking claim, and it is not necessary to rely on the dissenting opinion in *Eastern* (although it is at least doubtful that *Marks* even ad-

dresses a situation such as the explicit agreement of the four dissenting Justices in *Eastern* with a concurring Justice's rejection of a particular constitutional claim).

3. Finally, petitioners contend that review is warranted because there is now no "framework" for analyzing retroactive legislation other than the Coal Act. Pet. 23. That contention provides no basis for review in this case. The plurality and concurring opinions in *Eastern* identified the same critical characteristics that distinguished the operators that signed NBCWAs in 1974 and afterwards from those that did not, and both opinions found the connection of the latter group of operators to miners' expectation of lifetime benefits and the financial instability of the funds too attenuated to sustain the Act as applied to those operators. In view of that articulation of general agreement on the principles governing the constitutionality of the Coal Act in particular--principles that were followed by the court of appeals in this case and in the D.C. Circuit's decision in *Association of Bituminous Contractors*, *supra*--there is no basis for further review in a Coal Act case in order to address issues that might arise in *other* contexts in the future.

Petitioners incorrectly suggest that the Court's emphasis in *Eastern* on the fact that retroactivity is "generally disfavored" (Pet. 24) constitutes a significant departure from the Court's previous substantive due process decisions according a heavy presumption of constitutionality to legislation (including retroactive legislation) that adjusts the burdens and benefits of economic life. To the contrary, the plurality opinion in *Eastern* emphasized the Court's long-standing "concerns about using the Due Process Clause to invalidate economic legislation," 524 U.S. at 537, and avoided resting its decision on the Due Process Clause. Justice

Kennedy's concurrence did rely on due process principles, but that opinion did not discard the well-settled presumption of constitutionality for regulatory statutes; rather, Justice Kennedy found that presumption rebutted on the particular facts of the case in *Eastern*, which he considered to be a "rare instance[]" of "egregious * * * circumstances." *Id.* at 550. For the reasons we have given, this case presents no comparable circumstances.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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